Promoting Equality:
A New Vision

2000

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June 2000

The Honourable A. Anne McLellan
Minister of Justice
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear Minister:

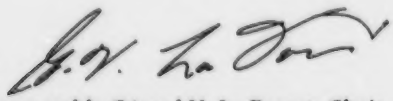
On behalf of my colleagues Mr. William W. Black, Me Renée Dupuis, Dr. Harish Jain and myself, I enclose the Report of the Canadian Human Rights Act Review Panel.

We wish to thank you for entrusting us with this ambitious mandate. We think we have arrived at reasonably workable proposals and are pleased to have completed the task within a very short time. Our consultations provided us with the opportunity to hear from many interested Canadians about how important protecting and promoting human rights is to them. We hope you will support our global vision to strengthen human rights in the federal sector.

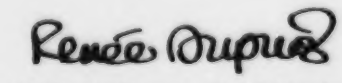
I would like to state that my task as Chair was made easier by the strong commitment and frank and fruitful exchanges provided by my colleagues.

Our task was also made easier by the outstanding work of our Research Director, Jim Hendry and our Executive Director, Patricia Lindsey. All the Panel Members are grateful for their support and that of the members of our Secretariat staff including, Helen Berry, Mary Lou Ellard-O'Neil, Mimi Lepage, Susie Nantel, Brigitte Poullet and Patrice Robinson.

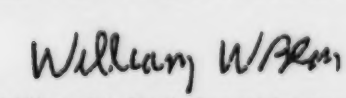
Yours Sincerely,



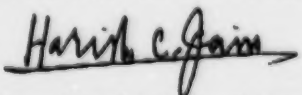
Honourable Gérard V. La Forest, Chair



Me Renée Dupuis, Panel Member



William W. Black, Panel Member



Professor Harish Jain, Panel Member

Canadian Human Rights Act Review
Panel Members

The Honourable Gérard La Forest, Chair

Mr. Justice La Forest is a widely respected, retired Supreme Court of Canada Judge. He has a broad range of expertise including administrative, constitutional and human rights law. In the 1970s, he was a commissioner of the Law Reform Commission of Canada and acted as a consultant to federal and provincial governments. He was first appointed to the bench in 1981 (New Brunswick Court of Appeal) and was appointed to the Supreme Court in January 1985, retiring in 1997.

Professor William W. Black

Professor Black is a professor of human rights law at the University of British Columbia and one of the past directors of the Human Rights, Research and Education Centre at the University of Ottawa from 1989 to 1993. Mr. Black conducted a review of the B.C. Human Rights Code that resulted in many practical changes to the Code. He has been a member of many human rights advisory committees, task forces and a member of the B.C. Human Rights Commission.

Me Renée Dupuis

Renée Dupuis has been practising law in Québec City since 1973. She specializes in human rights, Aboriginal peoples' rights and administrative law. She was a member of the Canadian Human Rights Commission (October 1989–October 1995). She carried out a study published by the Canadian Human Rights Commission in 1997: *The Canadian Human Rights Commission and Sexual Harassment Complaints.* She lectures in administrative law at the École nationale d'administration publique. She designed and directed seminars on democratic institutions and the protection of human rights for senior officials and judges from French-speaking countries. She was associated with the research program of the Royal Commission on Aboriginal Peoples, which published a report she co-authored in 1995: *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Québec.* She has acted as legal adviser for many Québec Aboriginal groups and as a consultant for various federal and provincial departments. The author of many books, articles and lectures, she published in 1999 at Carswell a work on the legal status of Aboriginal peoples in Canadian law: *Le statut juridique des peuples autochtones en droit canadien.*

Professor Harish C. Jain

Mr. Jain is a professor at the Michael G. DeGroote School of Business at McMaster University who specializes in systemic discrimination issues and has written extensively on this subject. Mr. Jain is an expert in human rights issues, particularly from an employment law context. He previously served as a panel member of the Canadian Human Rights Tribunal from 1986 to 1992, and then from 1996 to 1998. He was a member of the National Multicultural Liaison Committee of the Canadian Association of Chiefs of Police, and has worked extensively as a policy and research advisor to the government of South Africa on employment equity and affirmative action issues.

PART ONE: INTRODUCTION

CHAPTER 1

Summary of the Mandate, Consultation and Research Process

On April 8, 1999, the Honourable Anne McLellan, Minister of Justice, announced the establishment of an independent Panel to conduct a review of the *Canadian Human Rights Act*. The Act had not been comprehensively reviewed since it was passed in 1977.

Our mandate was to examine the purpose of the Act and the grounds listed in it, to ensure that the Act kept current with human rights and equality principles. We were also asked to review the scope and jurisdiction of the Act, including the exceptions contained in it. Our mandate also included a review of the current complaints-based model and to make recommendations for enhancing or changing the model to improve protection from discrimination, while ensuring that the process was efficient and effective. We were also asked to consider the powers (including the audit powers under the *Employment Equity Act*) and procedures of the Canadian Human Rights Commission and the Human Rights Tribunal. Notably, the equal pay provisions were not part of our mandate.

Our Approach to the Review

We met early in our mandate to decide how we were going to approach this extremely large task. We developed a research plan that identified the issues raised in our mandate. This plan formed the basis for an extensive research effort to support our decision-making process.

The research plan also formed the basis for a Consultation Paper released to the public in July, 1999. It contained over thirty pages of questions we thought were relevant to the issues raised by our mandate. The Consultation Paper was intended to inform interested persons about the subjects we wished to review and discuss, especially those people or groups who would attend the consultation sessions planned for the fall. Both the research plan and the Consultation Paper were based on the same set of questions to assist in the organization of the research and consultation.

Other research papers were commissioned from well-known experts in the field of human rights. We sought proposals publicly on two issues: the addition of the ground of social condition, and the provision of the Act that excepts the *Indian Act* and acts authorized by this statute. We pursued these two projects publicly because of their high profile. Authors of papers prepared summaries that were translated and placed on our web page so that the public would have access to this important information. Whenever possible we placed these papers on our web site to inform those who wished to express their views to us at our consultations or in writing. We wished to make our process as transparent as possible. We have relied on these papers extensively in our Report. We have provided very brief descriptions of the contents of these papers in an Annex to our Report.

We developed an elaborate consultation process as part of our approach. We wanted to hear from as many employers, service providers, labour organizations, human rights groups and other non-governmental organizations, and members of the public as possible on the issues raised in our Consultation Paper. Our consultation process had different streams. We organized round table discussions with employers, labour organizations and government departments in Ottawa. We held round table discussions with non-governmental groups in Halifax, Montreal, Toronto, Ottawa, Edmonton and Vancouver. We also hosted evening meetings in each of these cities to hear from members of the general public. These public meetings were announced in the local media. We also held expert meetings on specific subjects areas.

We deeply regret that we could not visit each city, province and territory because of time and budget restrictions. However, we did provide travel funding for those who were invited and who wished to attend a meeting.

Participation for our consultations was determined by reviewing applications. Those wishing to attend our meetings were asked to fill out an application for an invitation. We were looking to hear from organizations that had experience and knowledge of human rights issues in the federal jurisdiction that would help us with our work. Our consultation process was designed to accommodate the needs of people and organizations whose budgets might not allow them to participate. In many cases, we provided travel funding for individuals

to come to our consultation meetings. We also provided submission funding for a number of organizations operating on very small budgets.

Our Web site was a key aspect of our consultation plan. We posted key issues of concern to us, and in addition to the summaries of our research papers we posted summaries of all our round table discussions. The third phase of our consultations included a request for written submissions to be provided by December 1st, 1999, in order to be able to take account of all of the written submissions in our Final Report. We received over 200 written submissions and over 250 individuals participated in the oral hearing phase of our consultations.

We had an opportunity to consult with many provincial and territorial human rights commissions by meeting, letter or conference calls, including the Québec Human Rights Tribunal. These Commissions and Tribunals shared their experiences and their concerns in their respective jurisdictions.

We met with the two previous Chief Commissioners to discuss the evolution of the Commission since its inception. We had extensive meetings with the Canadian Human Rights Commission and Tribunal. We would like to thank the Chief Commissioner of the Canadian Human Rights Commission and the President of the Tribunal and their staffs for the volumes of information they provided to the Panel, and their openness to the review process.

We benefited enormously from the high caliber of oral and written submissions. Individuals and organizations were frank about their concerns with the existing system. But many groups also took the time to reflect on positive solutions that would advance human rights in the federal system. We are grateful to all those who took the time to respond to our consultations. During the course of our consultations we learned a great deal about additional issues that we had to consider. For example, some unions raised the issue of an internal human rights responsibility system, similar to what employers require to comply with health and safety laws. This suggestion was highlighted in our summary of the labour meetings in order that employers and non-governmental organizations could respond to it in their written submissions.

We met several times in Fredericton to deliberate on what we heard and read. We now wish to report on our deliberations in the following chapters.

We have abided by the terms of our ambitious mandate and we have respected the strict time frame. We believe that we have succeeded in providing an accurate account of the concerns of the Canadian people on human rights issues. We wish to give the government the message that it is time to reinforce human rights in Canada and a global view of the changes that are needed.

CHAPTER 2
The Context of the *Canadian Human Rights Act*

The *Canadian Human Rights Act* works with other laws to protect human rights. The Act applies to federal private businesses as well as the federal government and the governments of the Northwest Territories and Nunavut. In contrast, the *Canadian Charter of Rights and Freedoms*, which also prohibits discrimination, only applies to governments.

Each province and territory also has a human rights act that covers businesses and organizations within their jurisdiction. For example, discrimination in housing and other types of accommodation would be brought to a provincial or territorial human rights commission.

The Act applies to all employers and providers of goods, services, facilities and accommodation within the legislative power of the federal Parliament. In addition, it deals with hate messages where a person acts individually or together with a group of persons to create hate messages about a person or persons protected by the grounds in the Act, whether those messages are communicated by telephone or by any other means of telecommunication within the ability of Parliament to regulate.

Specifically, the Act applies to the federal government, including the Canadian Forces and the Royal Canadian Mounted Police, and governmental agencies. It applies to approximately 48 Crown Corporations such as the Canadian Broadcasting Corporation and the Canadian Film Development Corporation. It also applies to individuals and corporations carrying on the business of inter-provincial and international transportation by road, rail, air, ferry, pipeline and shipping and navigation. Further, it applies to those in the telecommunications business, including broadcasting, and to the postal service. It covers the chartered banks. It also applies to a special group of businesses which Parliament has declared to be for the general advantage of Canada, such as feed mills, grain elevators and some mining operations. It applies to the nuclear energy business, including uranium mining and processing.

Important Structural Considerations

The organizations that are subject to the Act come in many sizes. At the end of 1998, there were about 340 federally regulated private sector employers and Crown Corporations with more than 100 employees, many with substantially more than that number. There were about 65 government departments and agencies for which the Treasury Board played the central employer role, with the Public Service Commission usually doing the actual hiring and promoting, and about 16 public sector employers with more than 100 employees not governed by Treasury Board. In 1999, there were approximately 285,000 employees in the public sector. Crown Corporations employed 72,000 people in 1997/1998. Employers covered by both the *Canadian Human Rights Act* and the *Employment Equity Act*, which is administered by the Canadian Human Rights Commission and Human Resources Development Canada, include approximately 870,000 employees.

In addition to these employers there are a few thousand smaller employers, including small broadcasters, transportation companies (trucks and buses) and those providing other types of services within federal jurisdiction, with fewer than 100 employees. (Canadian Human Rights Commission Annual Report 1998)

Level of Knowledge and Experience with the Act

In addition to differences in size, the Commission deals with organizations with different levels of knowledge about the requirements of the Act in their workplaces and in the provision of services. Some larger employers will have human resource departments with considerable knowledge and experience in dealing with the Act and sophisticated resources to deal with complaints of discrimination against the organization. They may have a section that deals specifically with rights issues, both human rights and linguistic rights. Many will have the benefit of in-house legal service units. Some of these employers may be very centralized. These organizations may have highly regularized employment policies both because of collective agreements and the organization's need to ensure consistency in its employment policies in regional or branch offices across Canada.

On receiving a complaint, the Commission might find itself dealing with a head office about actions of supervisors and employees in the field. The investigation may be handled from the head office with information gathered from an investigation onsite. Often the employer may conduct its own investigation before responding to the Commission's request for facts and documents. Because of the breadth of the country and

the hierarchical nature of many organizations, it might take considerable time before a response is sent. The internal investigation by the employer is typically not provided to the Commission which must conduct a second investigation to get at the facts after the employer has already interviewed the witnesses.

Some organizations have little capacity to know what is required of them under the Act or to respond to complaints filed against them. However, some smaller employers belong to an industry organization such as the Canadian Trucking Association that can provide some general information such as model harassment policies to members.

Geography

Geography creates some problems for the design of the Act. The Commission has for some years conducted the majority of its investigations by telephone and so complainants and respondents may never see the investigator assigned to their case. Even when Commission investigations were carried out by regional offices there was not an office in every province and territory.

Degree of Unionization

Employers and service providers tend to be highly unionized in the federal jurisdiction. Many government employees are unionized and are represented by more than 15 unions. Of the approximately 700,000 employees covered by the *Canada Labour Code*, including the federal private sector and some Crown Corporations such as Canada Post, about half are unionized in about 1800 bargaining units. About two thirds of these employees are in the transportation and communications industries which are the most highly unionized in this group. On the other hand, the banks, with about one quarter of these employees, are not unionized. Unions vary in size and their affiliation with large national and international unions.

Many of the collective agreements themselves contain anti-discrimination provisions. Thus, many federal workplaces have a process for addressing anti-discrimination issues that utilize labour arbitrators under the Code. The Supreme Court of Canada has held that unions may be jointly liable with employers for human rights infringements in the workplace in some situations. Therefore, they are a significant partner in creating a non-discriminatory workplace in federal jurisdiction.

Changes in the Public Service

The employment context in the federal sector has been very dynamic over the last few years. The size of the Public Service has shrunk since rigorous staff cutbacks were initiated in 1995, coupled with various departure programs (including early retirement and early departure incentives), reorganization and privatization. Since the introduction of Program Review, there was a 17% drop in the number of federal government employees between March, 1995 and March, 1998. There were about 179,000 public servants in 1999. This does not include separate employers, such as the RCMP. There have also been some employee transfers to various provincial governments as programs were shifted to a different level of government. The government has also increased its use of contract workers. This issue will be discussed in further detail in Part Four: Scope of the Act.

Some departments and agencies have grown in size since 1995 while others have become smaller. The occupational profile of the Public Service has been changing, with an increase in information processing and data management positions requiring new qualifications or greater specialization. The 1998 Treasury Board Annual Report on Crown Corporations stated that there was an overall reduction in the number of employees of Crown Corporations in the last few years, with a large portion of the change coming from the privatization of Canadian National Railway in November, 1995.

Major Developments in Federally Regulated Industries

The 1998 Annual Report on the *Employment Equity Act* reported that in the banking sector the major banks have sought changes to the rules governing banking to remain competitive in the face of globalization of financial services. The broadcasting and telecommunications sector has been changing with major technological innovations, with a significant effect on the industry and the corporate organization.

The international nature of some of the federal businesses, especially in the transportation sector, raises the issue of compliance with standards set in the United States in the area of mandatory drug testing and criminal conviction.

Overall there appear to be more jurisdictional challenges in the federal sphere than in the provincial, with more procedural challenges to the Commission's processes.

CHAPTER 3
The Purpose and Language of the *Canadian Human Rights Act*

Issue

We examined whether the purpose provision in the Act should be amended to recognize developments in the concept of discrimination since 1977 and whether its language should be updated to reflect any change in the purpose of the Act.

The Importance of a Purpose Clause

The purpose of the CHRA is set out in section 2 as follows:

> PURPOSE OF ACT
>
> **The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.**

This statement of the purpose has been very important in the interpretation of the protection provided by the Act, its remedial focus and the concept of discrimination itself. Looking at the history of the interpretation of the purpose clause in the Act is instructive in providing an insight into the development of the concept of discrimination over the past two decades.

In the early 1980s, the courts were of the view that human rights legislation was meant to deal only with intentional (or direct) discrimination. This was consistent with the idea that equality meant that everyone should be treated in the same way. As long as an employer did not intend to deny employment because of religion or race, then there was a sufficient amount of equality. This has become known as a formalistic kind of equality. It meant that as long as employees could comply with rules made with the majority in mind, then there was no harm to be alleviated by human rights law.

Adverse Effect Discrimination

In *Bhinder v. Canadian National Railway* (1985), the Supreme Court of Canada decided that the broad aim and purpose of the Act covered adverse effect discrimination. The Court held that an employment rule that required all employees to wear hard-hats for safety reasons discriminated against Sikh employees whose religious principles forbade any head-covering but a turban.

This decision meant that the Act prohibited not just acts of direct discrimination where individuals were expressly excluded from employment or services because of personal characteristics connected with the listed grounds of discrimination, but also that the Act prohibited conditions of employment and accessibility to services which did not expressly single out a group of employees but had a negative effect on them because of their personal characteristics. The Court felt that the purpose of the Act to eliminate and remedy discrimination required the recognition of the fact that a discriminatory act was harmful whether intended or not.

The concept of adverse effect discrimination was an important step towards a more comprehensive understanding of discrimination. It meant that employers and service providers could not ignore the effect of their policies on employees and customers based on the prohibited grounds.

This development initiated a legal recognition of the fact that each person is different and has different needs and capacities. The Supreme Court of Canada held in the companion case to *Bhinder, O'Malley v. Simpsons-Sears* (1985), that where a company policy adversely affected an employee because of her religion (Mrs. O'Malley could not work on Saturday because she was a Seventh Day Adventist), the employer had to show that it tried to accommodate her religious needs to the point that it caused undue hardship to the business. In *Alberta Human Rights Commission v. Central Alberta Dairy Pool* (1990), the Court decided the duty to

accommodate was triggered whenever an employment rule had an adverse discriminatory effect on an employee.

Systemic Discrimination

Though adverse effect was a powerful device for analyzing whether a policy had a discriminatory effect on individuals contrary to the purpose of the Act, it was not a comprehensive concept of discrimination. This came with the idea of systemic discrimination adopted by the Supreme Court of Canada in another case under the Act.

In *Action Travail des Femmes v. Canadian National Railway* (1987), the Court decided that a purposive approach to interpreting the Act required the recognition of another form of discrimination with potentially greater consequences in terms of the number of people affected. This was called systemic discrimination.

The Court stated that "...systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring, and promotion, none of which is necessarily designed to promote discrimination... ." It called for systemic remedies, such as the employment equity order made by the Tribunal in that case. The Court wrote that "to combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged."

Looking at discrimination in this way recognizes that human activities, such as employment and the provision of services, proceed on the basis of assumptions and value judgments about the capacities and needs of individuals. These assumptions often reflect ideas about the place in society of certain individuals because of their personal characteristics. This in turn may be reflected in the way the workplace is ordered, in the terms and conditions of employment, and in decisions about who should be hired and promoted. While some of these assumptions may be accurate, others are harmful, in that they create barriers to the full participation of individuals in the workplace or in access to services.

The idea of systemic discrimination exposed the underlying causes of much discrimination in the workplace. These causes related to the way employers and service providers treated differences between individuals. Differences in the needs and capacities of employees based on their disabilities, their family responsibilities or religions were assumed to be of insufficient importance to be accommodated in the system or were simply overlooked. For example, a workplace designed with the assumption that all employees are able-bodied will create barriers for others. These barriers exist and prevent some people from participating, whether or not the assumption is conscious or whether the effects are intended.

In fact, the idea of systemic discrimination allowed for the next extension of the concept of discrimination, which was to question why employment and service systems were based on the assumption that there was such a thing as a "normal" employee or customer. The underlying assumption was that anyone who was not a "normal" employee or consumer was a "special interest" whose needs had to be accommodated based on this normal standard subject to a cost limit. Categorizing an interest as "special" suggests that society has a choice about whether to recognize it or not.

We think the language in the Act should be changed to reflect the fact that, at least as far as the Act extends, there should be no such choice and that these are not "special" interests. It should reflect the idea that everyone should have the same right to participate in the matters covered by the Act. This involves adopting the notion of "substantive equality" which requires an acceptance of the fact that everyone is different and that positive measures may be needed to ensure that some individuals may participate as fully as others. These equalization measures should not be looked on as "special" measures, but rather as simply what it takes to recognize the right of everyone to participate as fully as they can in work and services. The Act should refer to the goal of full participation. The concept of "substantive equality" needs to be actualized in order to permit full participation.

The Remedial Purpose of the Act

The Supreme Court of Canada considered the purpose provision of the Act in *Robichaud v. Canada* (1987). The question at issue was whether the government was responsible for sexual harassment of one of its employees by one of its managers. The Court considered the purpose provision of the Act and the proposition that human rights legislation must be interpreted to give effect to its purposes. That meant that "...the Act (s. 2) seeks "to give effect" to the principle of equal opportunity for individuals by eradicating invidious discrimination" and not by punishing discriminators. The main concern of the Act was removing discrimination and

redressing socially undesirable conditions, so motive or intent was not important.

In this case, the Court rejected theories of criminal and fault-based liability. It expanded the liability of employers for actions of employees based on the idea that only employers had the power to change the workplace, rather than on the idea that employers should be responsible only for the actions they authorized employees to do, which would exclude liability for sexual harassment not authorized by employers. This was a new type of statutory liability tailored to the purposes of the Act and made liable the person who could take remedial action to remove undesirable conditions.

The Court also was of the view that the educational function of the Act could also suffer if the employer were not liable for acts of employees.

The *Robichaud* case provides a working basis for some changes to the Act. The employer or service provider has control over the workplace or the way in which services are provided. This forms a secure policy basis for a positive duty to eliminate discrimination in areas within its control. The *Robichaud* case also exemplifies the Court's view that the prime purpose of human rights legislation is remedial. It is also meant to prevent discrimination and to provide education about discrimination.

The *Robichaud* and the *Action Travail des Femmes* cases suggest that our recommendations should, whenever possible, reflect an approach that will remedy systemic discrimination and attach liability to those who can take action to ensure that the principle of equality is advanced in the future.

The Perspective of the Act

The Court considered the purpose clause of the Act to justify the intrusion that section 13 (which makes repeated telecommunicated hate messages a discriminatory practice) made on freedom of expression in *Canadian Human Rights Commission v. Taylor* (1990). In that case, Taylor was found liable for hate messages contrary to section 13 of the Act. Taking into account the purpose provision of the Act, the majority of the Court was of the view that "...messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multi-cultural society which is committed to the idea of equality."

The majority of the Court thus looked at the prohibition of hate messages from the point of view of those affected. This is an important orientation. This is found now in the current view of the Court about the perspective from which the equality guarantee in the Charter should be viewed. That is, the alleged discriminatory law should be looked at from the point of view of a reasonable person in circumstances similar to that of the claimant, taking into account the relevant contextual factors.

The Need for a Purpose Clause

We are of the view that a purpose provision in the Act is necessary.

The current provision has been sufficient to permit some of the major revolutions in our understanding of discrimination, the basis of liability and the perspective for viewing discrimination. We considered whether the present purpose clause should be changed to reflect developments in the concept of discrimination since 1977. In our view, the purpose provision should set the tone for the Act's approach to ensuring equality without discrimination. At the same time it should not freeze the development of the concepts of equality or discrimination.

The general purpose of the Act must be to ensure the achievement of equality in the way the concept has come to be understood in the evolutionary process described above.

Equal Opportunity

The current purpose provision states that the Act is meant to assist individuals who are able to make "for themselves" the lives they wish and "are able" to have, consistent with their obligations to society. The Act then aims at ensuring equal opportunity without the hindrance or prevention by discrimination based on listed grounds. The concept of having one's needs accommodated as part of the aspirations of individuals was added to section 2 in June 1998 to reflect the addition of a new provision expressly adding the duty to accommodate in section 15 of the Act, rather than as a major shift in the protections of the Act.

The purpose provision serves a strong symbolic function. The term "equal opportunity" may be somewhat outmoded now. However, the concept is still full of promise based on the idea that all individuals have unique abilities and aspirations. The concept has also shown itself capable of supporting an evolving

concept of discrimination, from direct to adverse effect/accommodation to systemic discrimination. However, it may not fully express the idea that attainment of equality may require more than simply equal competition for jobs and services in the marketplace. It does not fully encompass the idea that some individuals may need some positive action to ensure that they are equal in participation in employment and services.

Recent Developments in the Concepts of Discrimination and Accommodation

Through amendments to the Act in June of 1998, an employer or employee association wishing to establish that a job requirement came within the *bona fide* occupational requirement (BFOR) exception in the Act, now has to show that they have attempted to accommodate the individual or class of individuals to the point of undue hardship taking into consideration health, safety and cost. If a BFOR can be established, the Act provides that the requirement is not discriminatory. In other words, as worded now, the BFOR is part of the definition of what constitutes a prohibited discriminatory practice.

We heard at our consultations and read in the submissions that we received from employers they were unhappy with the June, 1998 amendment to the Act that added the duty to accommodate to the point of undue hardship. They were mainly concerned that the amendment limited the factors that can be taken into account in assessing undue hardship to health, safety and cost. They were concerned that such matters as the effect of accommodations on matters covered by a collective agreement, such as seniority or shift preferences, could not be considered in this assessment. They felt they had received guidance from the Tribunal and arbitrators on what the duty to accommodate meant, and that the amendment would require them to re-litigate many issues they felt were resolved.

After the Act was amended to make this change, the approach established by the amendments was also established by the Supreme Court of Canada as the standard *bona fide* occupational requirement analysis in the case of *British Columbia v. British Columbia Government and Service Employees' Union* released in September, 1999. In that case, the question was whether certain physical fitness requirements for the job of forest firefighter were justified as *bona fide* occupational requirements. The Court held that its earlier approach that discrimination had to be categorized either as direct discrimination (where the defence was the *bona fide* occupational requirement) or as adverse effect discrimination (for which the defence was accommodation to the point of undue hardship) was too complex, unrealistic and artificial. Instead, all discrimination in employment must be justified by a *bona fide* occupational requirement that takes into account the duty to accommodate to the point of undue hardship.

One of the reasons for the Court's change of view was its concern that only the adverse effect analysis required a consideration of accommodation. Further, it did not require an examination of the question of whether the employment rule was based on a discriminatory standard, for example, one that was based on a male-only concept of who should normally be doing the job. This allowed systemic discrimination in the workplace to continue insofar as it maintained an employment structure based on under-inclusive ideas about who should be doing the work.

The Court said that the new *bona fide* occupational requirement standard required employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard. This would suggest an amendment that would place a positive duty on employers and service providers to eliminate discrimination in the workplace and in the way in which services are provided. The Supreme Court of Canada said: "They must build conceptions of equality into workplace standards." This is also consistent with the duty imposed on employers covered by the *Employment Equity Act* to identify and plan to eliminate barriers to employment for the groups targeted by that Act.

In light of this, we do not wish to re-open the discussion surrounding the June, 1998 amendments to the Act and turn back the clock on the protection provided by these new provisions.

Further, we think the proposed amendment should make clear that this positive duty includes an affirmative duty for employers and service providers to accommodate to the point of undue hardship. This would be consistent with the idea that accommodation of differences is not a defensive, and therefore unusual matter, but is part of the recognition that everyone is different and should be able to participate to their potential. This is also a lesson that we can take from the Supreme Court's recent decision.

Should the Act Protect Only Disadvantaged Groups?

The Act now prohibits discrimination on the eleven grounds listed in section 3. It does not provide a definition of discrimination, other than to describe discriminatory practices, usually in terms of an adverse differentiation or denial on a prohibited ground. It does not focus its protection only on individuals who have suffered disadvantage based on personal characteristics that have traditionally been connected with disadvantageous treatment resulting in persistent patterns of discrimination.

The Supreme Court of Canada has focused the protection of anti-discrimination provisions in the Charter and human rights legislation on individuals who suffer disadvantage connected to identifiable personal characteristics. Though the Court has not said that only members of disadvantaged groups can make use of the Charter equality protections, it has stated that that the social reality is such that they will be less likely than members of advantaged groups to have difficulty in demonstrating discrimination (*Nancy Law v. Canada* [1999]). Though we did hear submissions that it be made clear that the Act was meant to help only disadvantaged groups, this might fall short of the Court's view that there may be cases where others could make a discrimination claim.

Thus, the Act could focus on ensuring equality for all rather than restricting the protection of the Act to disadvantaged groups. However, we are of the view, in accord with the current state of the law in Canada, that the idea of equality in the Act encompasses positive measures to remedy inequality and the need to take account of disadvantage.

A Definition of Discrimination?

The Act now prohibits certain defined discriminatory practices. A typical example is section 7, which prohibits refusals to employ or to continue to employ, or adverse differentiation in the course of employment based on the listed grounds.

Other human rights Acts define discrimination. For example, Manitoba defines it to mean differential treatment on the basis of being an actual or presumed member of a group defined by a listed personal characteristic rather than personal merit, or being associated with such a person, or differential treatment simply on the basis of a listed personal characteristic or the refusal of reasonable accommodation based on a listed characteristic.

In essence, the Supreme Court of Canada has generally interpreted the human rights Acts as having the same purposes and prohibitions despite variations in wording and has, in fact, said that discrimination has the same meaning as under the Charter. This has not resulted in a conservative interpretation of the Acts. Rather, all the human rights Acts and the Charter share the broad, liberal interpretation the courts have provided. We can perhaps conclude that little turns on the definition of discrimination in the Act. Our main concern must be to not restrict its future development.

Though a definition of discrimination serves an educational function, a more elaborate definition might cause as much confusion as it avoided. Further, a definition could freeze the concept so that it would not develop in the future.

Create a Duty to Ensure Equality Without Discrimination

While it may not be a good idea to define discrimination, it is time to cast the language of the Act in a more positive way, to create a duty on the part of employers and service providers to promote equality and eliminate discrimination in much the same way that the *Canada Labour Code* creates a general duty for employers to ensure the protection of the safety and health of its employees at work (s. 124).

The Act could provide for a similar duty for employers and service providers under the Act to ensure equality without discrimination for their employees and consumers, and recognize that accommodation is needed to ensure that all may participate. Such an approach would be much more consistent with the broad purposes of the Act than simple prohibitions of discrimination. It would also be consistent with an approach that is much more proactive in eliminating systemic discrimination, one that would provide detail for the employer and service provider's duty through statutory requirements and guidelines and best practices codes.

This change in the language of the Act should not change the meaning of discrimination. Rather, it should signal a change in the approach to attain the purpose of the Act.

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Referring to Canada's International Equality Obligations in a Preamble

The current Act grew out of the concerns of the international community since the Second World War about the elimination of discrimination. It does not expressly state the connection between the Act and Canada's international obligations.

Canada has bound itself to a considerable number of international equality obligations. Some provincial and territorial human rights legislation refer in their preambles to the *Universal Declaration of Human Rights* and some generally to other international obligations.

We think it would be appropriate to make this connection in a preamble to the Act. The preamble of human rights legislation has been used to determine the purpose of such legislation. For example, in *O'Malley v. Simpsons-Sears* (1985), the Supreme Court of Canada described the fundamental nature of human rights legislation. The Court used the preamble to the Alberta human rights legislation for the same purpose in *Vriend v. Alberta* (1998), when it ordered that Alberta human rights legislation must be treated as though it prohibited discrimination on the ground of sexual orientation, because failing this, the law was in breach of the Charter. It is important that this general link be made with the international tradition from which our domestic human rights tradition is developed.

We think that both a preamble and a purpose clause are useful. The preamble could identify the broad aims of the Act, including the relevance of Canada's commitment to achieve equality. The purpose section could identify more precisely the principles underlying the Act.

Recommendations:

1. We recommend that the Act have a preamble referring to the various international agreements that Canada has entered into that refer to equality and discrimination.

2. We recommend that the Act contain a purpose clause in conformity with the principle of the advancement of equality of all in Canada and the elimination of all forms of discrimination, including systemic discrimination, taking into account patterns of disadvantage in our society.

3. We recommend that the language of the Act be premised on a duty of employers and service providers to ensure equality without discrimination in the workplace and in the provision of services. We recommend that the duty to ensure equality include a duty to provide accommodation to the point of undue hardship.

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(a) Systemic Discrimination

The Issue

One issue of major importance to the Panel is whether the Act should focus on systemic discrimination.

The Prohibition Against Systemic Discrimination in the Act

Previously, we explain the development of the concept of discrimination over the last two decades. We note that it was in a case under the Act, *Action Travail des Femmes*, that the Supreme Court of Canada recognized and described the concept of systemic discrimination.

As can be seen from the various kinds of practices and attitudes that were the subject of the *Action Travail des Femmes* case, systemic discrimination can consist of: direct discrimination, such as refusals to hire women; adverse effect discrimination, resulting from the use of tests meant to determine mechanical ability that disproportionately exclude women from consideration while not assisting the employer in determining whether the applicant could do the job; and attitudes, assumptions and stereotypes about the abilities or lack of abilities of women to do relevant blue-collar work.

The current Act contains provisions aimed at what will often be systemic discriminatory barriers in the workplace. For example, section 10 prohibits employers or unions from establishing or pursuing policies and practices and entering into agreements affecting any recruitment, referral, hiring, promotion, training, apprenticeship, transfer or other employment matter or a matter affecting prospective employment that deprives or tends to deprive employees of employment opportunities on a listed ground of discrimination.

The Act also currently prohibits discrimination against an individual in employment in section 7. The Supreme Court of Canada has held that both sections 7 and 10 prohibit adverse effect discrimination. It probably also prohibits systemic discrimination as well because systemic discrimination may underlie the discrimination against an individual under section 7. It seems anomalous to us that the prohibition of discrimination in employment is found in two sections of the same Act, when they, in fact, overlap. We are of the view that the approach in the current Act that appears to distinguish between discrimination against an individual and discrimination in policies and agreements is not necessary and should not be continued in a new *Canadian Human Rights Act*. There should be only one provision dealing with ensuring equality without discrimination in employment in the future.

Section 11 of the Act also deals with systemic discrimination by prohibiting differences in wages between male and female employees employed in the same establishment performing work of equal value. This was the subject of a recent Tribunal ruling, upheld by the Trial Division of the Federal Court. The Commission reports in its 1999 Annual Report that this decision affects some 230,000 former and current government employees, about 85% of whom are women, giving them some $3.5 billion dollars in compensation.

Consultations and Submissions

We heard from a number of the participants at our consultations that the Act and the Commission should concentrate on the elimination of systemic discrimination.

"[...] There are concerns regarding the reluctance of the Commission to pursue and initiate systemic based complaints. In those circumstances where systemic based complaints are pursued [...] strict monitoring and enforcement of prescribed remedial measures is practically non-existent and oftentimes, respondents walk away with little more than a slap on the wrist.[...] The CHRA continues to address equality rights from a complainant-based approach to an almost exclusion of a systemic approach. This is a fundamental weakness of the Act which impacts the relevance and effectiveness of the Commission in administering the Act and undermines the goal to achieve equality.[...] It is imperative that the CHRA incorporates in the purpose of the Act an understanding of systemic discrimination and the enforcement of equality rights in a way that is empowering and respectful of the dignity of disadvantaged groups." (National Action Committee on the Status of Women)

"It should be recognized that the Act's purpose is both to redress the systemic denial of equality, as well as providing a means of redress for individuals whose equality rights have been denied." (Equality for Gays and Lesbians Everywhere)

"Resources are currently being diverted from the more systemic-oriented tasks of the Commission to complaint investigations. This reactive method is a bottomless pit. A complaints based system will never effect significant change or achieve substantive equality. A proactive approach needs to be taken, by assuring research, education and regulation making powers

receive the funding required. The Commission needs to bring forward cases that will have a broad impact on disadvantaged groups, by more actively addressing systemic discrimination." (Canadian Ethnocultural Council)

We heard comments that dealt specifically with the way the Act was amended to conform to the *Employment Equity Act.*

"The Commission's statutory mandate to enforce the EEA was clarified in the 1995 amendments to the Act. Nevertheless, these amendments effectively tie the hands of the Commission in enforcing the EEA. Section 40.1(2) prohibits the initiation of complaints based solely on statistical imbalance. We recommend that this section be repealed. Common sense suggests that statistically-significant under-representation of minorities can provide "reasonable grounds" within section 40(1) for believing that a discriminatory practice has occurred. The consequent inquiry will then determine if there is in fact discrimination. Even with the abolition of section 40.1(2), the 1995 amendments amount to tinkering with a flawed enforcement model.[...] What is required is a regulatory model, like the pay equity legislation of Ontario.[...] Both equality seekers and respondent groups benefit from human rights legislation that is certain and sets precise requirements. Under a proactive model, the Commission can provide this direction with the power to identify and prescribe clear and specific requirements that employers and others must follow. This direction is immeasurably more effective than simply stating that persons "must not discriminate"." (Minority Advocacy and Rights Council)

"[Section] 54.1(2) eliminates the Commission's powers to deal with systemic discrimination and stipulates that one must seek a remedy under the *Employment Equity Act.* However, the evidence to date suggests that this avenue of redress has been highly problematic.[...] The restriction on the Canadian Human Rights Commission's use of statistics ought to be removed immediately. Given the fact that many racial discrimination cases are of a systemic nature [...] the removal of this restriction in our view is a condition precedent for the effective resolution of complaints of racial discrimination." (National Capital Alliance on Race Relations [NCARR] and the Federation of Race Relations Organizations [FRRO])

Analysis

In the 1987 case of *Action Travail des Femmes v. Canadian National Railway*, former Chief Justice Dickson defined systemic discrimination and its solution:

> **"...systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" .... To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged."**

That case started with a complaint under the Act that Action travail des femmes had grounds to believe that Canadian National in the St. Lawrence Region pursued a policy or practice that deprived or tended to deprive women of employment opportunities. The Tribunal decided the case in 1984. It presents a good example of the kind of broad patterns of discrimination that can be involved in a systemic case. Because there are few cases like it, we think it useful to look at it and the issues of discrimination that arose in some detail to illustrate the scope a systemic case can have.

There was evidence in the case for example not only of specific practices that discouraged the hiring of women into entry level labourer positions with the railway, but of broader assumptions and attitudes in the organization that fostered the discrimination and also:

- Lack of executive management commitment to hiring women;
- Channeling of women applicants into traditionally female jobs such as secretarial positions;
- Negative attitudes about women, their ability to handle pressure, the kinds of jobs they were best at (such as cleaning); a view that women cannot do physically demanding work; a perception that women have no ambition or drive or cannot combine family and a job; a sense that the "old boys" network was important for promotions; a dislike of working around women;
- Individual incidents where women workers were made the butt of jokes by their male colleagues, simply ignored or sexually harassed;

- Though women composed 13% of the blue-collar work force in Canada, women employed by the railway were only 0.7% of the blue-collar work force in the region;
- The railway had not made any real efforts to inform women of opportunities in non-traditional occupations;
- Applicants were asked for experience in soldering, even though it was irrelevant to the job in which they were interested;
- Blue-collar positions were filled by supervisors and not the personnel office, out of the effective control of the railway, and evidence showed that foremen were generally unreceptive to female applicants.

The order given by the Tribunal also indicates other practices that presented barriers to women applicants:

- To discontinue mechanical tests that have a negative effect on women and are not warranted by the job;
- To discontinue tests required of women but not men, such as lifting a brake shoe with one arm;
- To discontinue the requirement of welding experience except for apprentices;
- To provide specific and objective information on the real requirements of non-traditional jobs;
- To treat male and female applicants equally at interviews;
- To issue a directive to foremen not to refuse employment on the basis of sex; and
- To implement its anti-sexual harassment directive.

The special order made by the Tribunal and affirmed by the Supreme Court of Canada was that the Railway was to hire one woman for every four positions until 13% of non-traditional positions were occupied by women, after laid-off CN employees had been recalled. The Court unanimously concluded that this employment equity plan was needed to ensure that future applicants would no longer be subject to the barriers formerly faced by female applicants.

The Court stated, with respect to the Order made by the Tribunal and employment equity in general:

> "...it would be helpful to review briefly the theoretical underpinnings of employment equity programs. I have already stressed that systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and "proper role" of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false. An employment equity program, such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.
>
> ...When the theoretical roots of employment equity programs are exposed, it is readily apparent that, in attempting to combat systemic discrimination, it is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future.
>
> ...To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required "critical mass" of target group participation in the work force, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of employment equity programs is always to improve the situation of the target group in the future. MacGuigan J. stressed in his dissent that "the prevention of systemic discrimination will reasonably be thought to require systemic remedies." Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future. Specific hiring goals, as Hugessen J. recognized, are a rational attempt to impose a systemic remedy on a systemic problem."

Other Systemic Discrimination Cases Under the Act

There have been very few other major systemic cases under the Act. Like the *Action Travail des Femmes* case,

these dealt with barriers that affected groups protected by the Act from discrimination that were created by many practices, policies and attitudes.

Women in Combat — *Gauthier and Others v. Canadian Forces*

In the 1989 case of *Gauthier v. Canadian Forces (CF)*, the Canadian Human Rights Tribunal had to determine whether or not "operational effectiveness" constituted a *bona fide* occupational requirement (BFOR) justifying the CF's discriminatory policy and practice of excluding women from combat-related jobs.

In assessing the alleged BFOR, the Tribunal evaluated the duties and conditions of those occupations related to combat and compared them to the capabilities of the excluded group. The Tribunal ruled that there was not sufficient risk of failure of performance of women in combat to justify the CF's general exclusionary policy.

The Tribunal ordered the implementation of a gender-neutral policy of full integration of women into all occupations, with the exception of the submarine service, where personal dignity concerns required the segregation of the sexes. The Tribunal also ordered that new occupational selection standards be implemented. The CF and the Commission were ordered to devise a mutually acceptable implementation plan in order to monitor, both internally and externally, the steady and full integration of women within 10 years.

Visible Minorities in the Public Service — *National Capital Alliance on Race Relations (NCARR) v. Health Canada* (1997)

In 1992, the National Capital Alliance on Race Relations (NCARR) filed a complaint against Health Canada (HC) alleging discrimination against visible minorities contrary to section 10 of the Act. The complaint alleged that HC established employment policies and practices that deprived visible minorities of employment opportunities in management and senior professional jobs. The matter went to a Tribunal in 1995. The complainants were NCARR, the Canadian Human Rights Commission, and the Professional Institute of the Public Service of Canada (PIPSC). The respondents were HC, the Public Service Commission and Treasury Board.

The Tribunal found the complainants' statistical evidence of under-representation of visible minorities in senior management persuasive. It was also influenced by evidence of differential treatment in many areas of staffing and career development.

The Tribunal found in favour of the complainants and an extensive employment equity scheme was ordered. HC was ordered to adopt and implement programs eliminating discriminatory employment barriers for visible minorities. HC was to ensure the maximum use of the knowledge, skills, and expertise of visible minorities and redress the effects of past discrimination. This was to be accomplished through means that included, but were not limited to, training and workshops, and accelerated appointment and promotion rates for visible minorities. An Internal Review Committee (IRC) was to monitor the implementation of the plan.

The Panel's Views

In our opinion, the record to date demonstrates the potential of broad systemic cases to change patterns of inequality. However, it also demonstrates the relative failure to achieve that potential in the past. There are a number of reasons for the limited effectiveness of systemic initiatives.

One reason is that very few such cases have been litigated. Indeed, the three cases described here represent most of what may be called "broad systemic cases." One cause of the paucity of cases is that broad systemic cases require a great deal of effort. Considerable effort will be required even before the case is filed to collect enough evidence to provide reasonable grounds for filing the complaint. Even after the Commission becomes involved, experience shows that ongoing participation of the complainant will be needed.

It is also noteworthy that the Commission has not itself initiated and litigated such cases even though it has statutory power to do so. On occasion it has also been less active than it might have been in developing a case after it is filed by someone else. An important reason for this apparent lack of enthusiasm has been the statutory obligation of the Commission to process every individual case that is filed. As we describe more fully in Part Two of our Report, the pressure to process individual cases and eliminate the backlog has tended to consume most of the Commission's resources and to deprive it of the capacity to choose where to direct its energies. The fear that more active systemic initiatives might be perceived as conflicting with the neutrality required to investigate and screen cases may also have played a role.

Even when these hurdles have been overcome and the Tribunal has granted a broad systemic remedy, there is a danger that the remedy will not be monitored and enforced in a way that makes it effective, as the three cases just described demonstrate.

The *Action Travail des Femmes* case illustrates this point. A paper prepared by ATF for us highlights aspects of the order that the organization says have not been complied with. First, sexual harassment has not been eliminated. Second, ATF disputes CN's claim that it is recalling workers when it fills new positions with laid-off employees and therefore is not hiring them and so does not have to comply with the one in four hiring target set by the order for non-traditional positions. Third, ATF says that CN has not filed the quarterly reports that it should under the order which would allow a determination of whether or not it is complying. ATF also says it has asked the Commission to intervene to ensure compliance with the order, but has been unsuccessful.

Since the Tribunal order in the *Gauthier* case, the CF have established an Advisory Board on Women with the mandate to make recommendations to the Minister on matters pertaining to the integration of women. In its 1997 Annual Report, the Commission recognized some progress but added that "the current situation remains troubling." In its 1998 Annual Report, the Commission said that "...there does not appear to have been a consistent and coordinated effort to ensure that women can both enter combat positions and be accepted in them." As a result, full integration was not in sight by the end of 1998, although February 20, 1999 was to mark the end of the ten years provided for in the Tribunal's order. In March 1999, the Commission concluded that full integration of women had not occurred by the expiry of the ten years provided for in the Tribunal order.

Very recently, the report of the Defence Minister's Advisory Board on Canadian Forces Gender Integration and Employment Equity, *Successes and Opportunities: 1999 Annual Report* stated:

"The Board notes that according to the first Equity Plan for the Canadian Forces, all designated groups are substantially underrepresented. (page two)

... The Board encountered a fundamental difference in attitudes among the three commands. Air and Maritime Commands seem to have greater awareness and acceptance of concepts of diversity, while the Land Forces Command (LFC) appears to try to manage diversity instead of valuing it. Furthermore, the Board notes that the perception that standards have been lowered for women impacts negatively on gender integration, creating a fundamental barrier to the acceptance of women, especially in the Combat Arms occupations within LFC." (page 10)

The aftermath of the *NCARR* case is more positive, though some aspects have attracted criticism. Almost immediately, HC developed national action plans and identified goals. The Internal Review Committee continues to thrive and expand its role in the department. Many HC representatives have noted that their most powerful tool in implementing the order was an intense communications system with HC employees and management, which was developed at an early stage. NCARR did and continues to take an active role in monitoring the Department's progress. Some NCARR representatives have indicated that while the department does seem to be meeting the numerical requirements of the order, it has not fully embraced the spirit of the findings and awards of this case. Nevertheless, NCARR reports that it is satisfied that HC has made a serious effort and has achieved reasonable progress. The Commission uses HC's quarterly reports and NCARR's report to determine HC's progress and make recommendations. Representatives from the Commission have indicated that there is still room for improvement in the area of acting appointments and assistance with career planning. HC indicates that its main concern is in the area of sustainability of the order and maintaining momentum. HC also indicates that the Commission has been very helpful at the monitoring stage, readily answering questions and providing advice.

The March 2000 report on visible minorities in the Public Service, *Embracing Change in the Federal Public Service*, Report of the Task Force on the Participation of Visible Minorities in the Federal Public Service, states:

"From visible minority employees, the Task Force heard numerous charges of systemic discrimination along the lines of "old boys' club." Visible minorities across the country expressed dismay about the lack of recognition of foreign degrees and credentials and about the scarcity of visible minorities on selection boards. Visible minority employees were concerned that the delegation of authority to departments for implementing employment equity has not been accompanied by appropriate provisions for accountability and that, as a result, systemic discrimination may remain embedded. They also believe many managers are either

unaware of government policy on employment equity and workplace diversity, or disregard it as they hire and promote." (page 16)

We do not, however, want to give the impression that large scale systemic discrimination cases such as these are the only type of case that addresses systemic discrimination. Most cases aimed at policies and practices that affect many individuals in the workplace can be described as systemic to the extent that they identify and remove barriers based on outmoded assumptions and stereotypes in the workplace.

For example, in the recent case of *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* (1999), the Court determined that an aerobic standard that kept many women out of a firefighter's job was discriminatory and not justified by a BFOR. In that case, the fault was not with the employer's interest in wishing to set the kind of aerobic standards necessary to carry out the firefighter's dangerous job as safely as possible, but with the fact that it did not consider whether all groups, including women, require the same aerobic capacity to do the job safely.

The British Columbia firefighter's case did not deal with the broader issue of whether women were under-represented in the particular workplace, though it is easy to conclude that this kind of an exclusionary standard would contribute to under-representation. Nevertheless, corrective action in this case can be described as removing a systemic barrier, because there would otherwise be a bar to women entering the workplace.

The *Employment Equity Act*

Consideration of equality issues in the federal sectors, particularly systemic issues, must take into account the other major piece of federal legislation for preventing and remedying systemic discrimination in employment, the *Employment Equity Act* (EEA).

This statute was enacted as a result of the recommendations of the Royal Commission Report on Equality in Employment (The Abella Report). The EEA is based on the assumption that the best demonstration that a workplace is free of systemic discrimination is that the representation of disadvantaged groups in the employer's work force reflects their representation in the pool of available workers. In this way, the EEA shows a way in which discrimination may be approached on a systemic basis. Furthermore, the EEA is based on a proactive approach to the problem. It requires that employers carry out the steps set out in the EEA aimed at eliminating systemic discrimination. The Commission enforces the EEA by conducting audits to determine whether employers have complied.

The EEA states that its purpose is to achieve equality in the workplace by correcting conditions of disadvantage experienced by women, Aboriginal peoples, persons with disabilities, and members of visible minorities "by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences." The EEA applies to much of the Public Service of Canada and to federally regulated private sector employers and designated bodies in the public sector that employ more than 100 employees. The Act provides for a mechanism for the Canadian Security Intelligence Service (CSIS), the Royal Canadian Mounted Police and the Canadian Forces to be brought under the EEA, but so far this has not happened.

Employers covered by the EEA are required to carry out certain obligations:

- to undertake a work force survey to determine the level of representation of the designated groups by occupational groups and to compare this with relevant labour force data to determine areas of under-representation;
- to conduct an employment systems review to identify barriers to designated groups in employment systems, policies and practices;
- to eliminate barriers in their employment systems not authorized by law, such as a mechanical test that excludes far more women than men, but which does not predict a person's ability to do the job;
- to institute such positive policies and practices to ensure that areas of under-representation are overcome within a reasonable time so that the degree of representation of the designated groups in the work force reflects their representation in the Canadian work force or in the segments of the Canadian work force that are identifiable by qualification, eligibility or geography and from which the employer might reasonably be expected to draw employees
  - — Employers are not obliged to take measures that would cause undue hardship, to hire or promote unqualified people, to create new positions or promote or hire persons contrary to the merit principle in the Public Service

- The EEA provides that employers in the private sector that primarily serve the interests of Aboriginal peoples may give preference to Aboriginal people unless that would breach the Act
- There are special provisions for seniority rights with respect to layoffs and recalls, and other seniority rights, such as those acquired under work force adjustment policies that do not breach the Act

- to develop and implement an employment equity plan specifying the policies and accommodations to be made to correct under-representation for the short-term (one to three years) and specifying short-term measures to remove barriers, both with timetables, short-term numerical goals and measures to correct under-representation and also long-term goals for increasing representation and strategies for achieving them;
- to ensure that their plan is capable of leading to progress in implementing employment equity;
- to make reasonable efforts to implement and monitor the plan to assess whether reasonable progress is being made;
- to review and revise the plan in the short-term to update the numerical goals and to make changes shown by the monitoring requirement to be necessary to make reasonable progress;
- to provide information regularly to its employees on the purpose of employment equity and about measures it will take to implement them;
- to consult with employees and their representatives or bargaining agents on implementing employment equity and on the revision of the plan;
- to maintain prescribed employment equity records;
- to provide annual reports to the Minister of Labour on representation of designated groups and a narrative summary of progress made in an employer's employment equity initiatives. The same applies to Treasury Board for public sector employers.

The Commission's Role Under the EEA

The Commission is responsible for enforcing these obligations, with the exception of the reporting. The Commission is urged to use persuasion and the negotiation of written undertakings to ensure compliance before using the more forceful methods prescribed by the EEA. Designated compliance officers may conduct compliance audits of employers, and are given powers of entry and search for that purpose.

The Commission and HRDC have published information to employers on what is required to comply with the EEA, the way in which the Commission will carry out audits, and what factors will be examined in assessing compliance.

We understand that the Commission auditors do not simply check to see whether the employer's forms are filled in, but rather engage in an in-depth analysis of whether the employer has identified under-representation, barriers, measures to improve representation, and goals and timetables. For example, they are required to provide probable explanations for any under-representation found in each occupational group, which should provide the employer with a reasonable basis to take corrective action. The audit may not reveal all the problems in an employer's work force, because an auditor may not be able to check every area of under-representation. But auditors must generally be satisfied that they understand the state of compliance.

Where such an officer is of the opinion that the employer has not complied with its obligations, the officer informs the employer and tries to negotiate a written undertaking to ensure that the employer agrees to take appropriate steps to remedy the non-compliance. If the undertaking is not obtained or is breached, or the employer fails to cooperate, the Commission may issue a written direction to the employer requiring it to take the necessary steps. The directions may not cause undue hardship, require the promotion or hiring of unqualified people or breach the merit principle in the Public Service, require the creation of a new job, impose a quota, or fail to take into account the proper factors in setting a numerical goal.

An employer may make a request for a review of the direction to the President of the Employment Equity Review Tribunal (also the Canadian Human Rights Tribunal). If the employer has failed to comply with a direction, the Commission may apply to the Employment Equity Review Tribunal for an order confirming the direction. However, the Commission only is allowed to take this step "as a last resort" after persuasion and negotiation have failed. The Employment Equity Review Tribunal holds a hearing and considers the question and has the power to order, confirm, vary or rescind the Commission's direction and to make any other appropriate and reasonable order in the circumstances to remedy the non-compliance. The order of the

Tribunal is subject to the same limitations in scope as a direction. The Tribunal's order may be made an order of the Federal Court and enforced as such.

The EEA provides that the Minister of Labour (HRDC) is responsible for developing and conducting public information programs, carrying out research, promoting the purposes of the EEA and publishing information, issuing guidelines and providing advice to employers and employee representatives concerning employment equity and its implementation.

The EEA contains a provision that it shall be reviewed every five years by a committee of the House of Commons, which shall report its findings, including any recommendations for change, to the House.

Changes Made to the Act by the EEA

The EEA modified the *Canadian Human Rights Act* by providing in section 40(3.1) of the Act that no complaint can be filed under the Act based on information obtained under the EEA. The Act was also changed to provide in section 40.1 that no complaint of discrimination in employment may be filed under the Act where the complaint is based solely on statistical information that purports to show that members of one or more of the designated groups are under-represented in the work force of an employer covered by the EEA. The Act was also amended to add section 41(2) giving the Commission discretion to reject a complaint where it is of the opinion that the matter was adequately dealt with in the employer's employment equity plan under the EEA. The Act was further amended to provide in section 54.1 that the Tribunal may not make an order prescribing special measures under section 53(2)(a)(i) of the Act requiring an employer to adopt special measures containing positive policies and practices designed to ensure that members of designated groups achieve representation in the employer's work force, nor goals and timetables for achieving that increased representation. Thus, the Act was modified to work around the EEA which was seen as the better method for dealing with situations where numerical under-representation was the sole issue.

In the first two years of audits, the Commission reports in its 1999 Annual Report that only a few (4) employers were actually in compliance at the time of the initial compliance audit, though many have given undertakings to bring themselves into compliance. The Commission reports that while there has been progress for some designated groups, "movement towards an equitable federal workplace continues at a snail's pace." Aboriginal people and people with disabilities in the private sector, and visible minorities and people with disabilities in the public sector, "are simply not making acceptable gains."

The Employment Equity System and the Human Rights Process

The result of the 1995 amendments was that some enforcement powers have effectively been transferred from the *Canadian Human Rights Act* to the *Employment Equity Act*. However, the EEA does not entirely exclude the Act from the fight against systemic discrimination. Many federal employers are not covered by the EEA. Services are not covered by the EEA. There are many cases of systemic barriers that can still be brought to the Tribunal, including medical or other standards and specific employment policies that affect many employees in federal workplaces. In fact, the EEA and the Act complement each other in the sense that our understanding of what constitutes a barrier to employment has usually been the subject of a ruling by a board of inquiry or Tribunal. In its 1999 Annual Report, the Commission states that identifying the barriers that contribute to under-representation continues to pose problems for most employers. This is work required under the EEA.

In Part Two of our Report, we will recommend that the Commission no longer be responsible for receiving and processing every complaint and that it be given the power to choose to become a party to selected cases that it considers of special significance. This change will give it the ability to emphasize systemic issues. We think this recommendation would enhance the effectiveness of the Commission in its efforts to protect against systemic discrimination.

We know that the human rights process has produced employment equity orders in cases like *Action Travail des Femmes* and *National Capital Alliance for Race Relations*, parts of which are not possible now with the amendments to the Act by the EEA. We heard calls from those who attended our consultations for the repeal of those limits, or at least the limit on the ability of the Tribunal under the Act to make an employment equity order.

We understand the force of those suggestions. However, we have concluded that effective protection against systemic discrimination cannot be achieved simply by returning to the wording of the Act as it existed before 1995. We have described the weaknesses

in the systemic enforcement model that previously existed, including the fact that only a handful of broad systemic cases were decided. Part of the purpose of the *Employment Equity Act* is to get around the limitations of a complaints-based approach to enforcement. We think the most effective protection will occur if these two statutes reinforce each other rather than working at cross purposes and there are no gaps between them. The result should be a considerable improvement over what existed before. But at the very least, none of the changes that have been made should provide less protection than existed before 1995.

We have concerns about the way these two statutes have worked together so far. However, our analysis is limited by the fact that the EEA in its present form has been in effect for less than five years and some matters are not yet clear. For example, there are as yet no decisions from the Employment Equity Review Tribunal on the scope of directions allowed and the power of the Commission auditors to delve deeply into employment systems.

One of our concerns is that the information gathered in the course of an audit cannot be used in a complaint under the Act. This information could shed considerable light on patterns of inequality in an industry or a sector. It could assist in the resolution of some other dispute about whether or not a practice breaches the Act. It could also assist in fashioning a remedy in a case involving the same workplace.

We are concerned that greater clarity is needed in the scope of the orders the Tribunal can make. It is not clear to us why a Tribunal under the Act should not be able to issue an order for goals and timetables for hiring members of a group in a case where the systemic discrimination issue arises in a claim not based on statistics. Nor is it clear why a Tribunal should not be able to make an order where an inequality may be missed in the audit process.

We are also concerned that the time that could be spent in negotiating undertakings and following up on them, and generally the use of the Tribunal only as a last resort, slows the advancement of equality that is the goal of the Act.

We are concerned that the EEA does not allow for the participation of community groups in the process. These are invaluable sources of information about the various communities whose members' equality is supposed to be advanced by the Act. The 1995 amendments greatly limited the power of community groups to file complaints under the Act, and we think that compensating measures deserve consideration if these limitations remain in place.

We hope these matters will be considered during the EEA review and if not, there should be some modification of the 1995 limits. We believe that there should be some way to ensure that the Tribunal or the Employment Equity Review Tribunal either alone or together be able to make an order like the one made in *Action Travail des Femmes*. If this cannot be done under the EEA, then it should be possible under the Act.

We also urge the Commission to take the broadest possible interpretation of its powers under the EEA. If there is any doubt about the scope of the Commission power to make directions and the Employment Equity Review Tribunal to give orders under the EEA, we think it should be resolved in favour of the auditors being able to obtain the required information and the Commission to give broad directions. We think there should be a provision in the Act to ensure that nothing in the *Employment Equity Act* be interpreted to limit by implication the powers of the Commission or the Tribunal under the Act. The Panel believes this would help ensure the integrity of the human rights process.

Finally, we believe the power to make rules, policies and Codes of Practice discussed in Part Two of this Report is an essential tool for attacking systemic discrimination. In effect, the Commission could ensure the follow-up of claims and Tribunal orders by elaborating, as needed, standards aimed at indicating how practices should be changed or the kind of policies that should be adopted to resolve systemic problems. The Commission and the Tribunal should also pay special attention to the elaboration of systemic remedies and their follow-up in such cases.

Recommendations:

4. We recommend that the *Employment Equity Act* and the Act should be made to work together so that it is possible to obtain an employment equity order like the one that was approved by the Supreme Court of Canada in *Action Travail des Femmes*, based on a close examination of an employer's work force and workplace. We recommend that if the consequential amendments made to the Act by the *Employment Equity Act* stand in the way of this, they should be changed.

5. We recommend that a process be established to ensure that community groups have a way of giving input into the Commission's implementation of its responsibilities under the EEA.

6. We recommend that the Commission and its auditors press for the broadest interpretation of their powers and that any decision-maker resolve any doubt about the scope of these powers in favour of the Commission.

7. We recommend that the relationship between the Act and the *Employment Equity Act* be considered in the five-year review that we are recommending for the Act.

8. We recommend that the Act provide that nothing in the *Employment Equity Act* be interpreted to limit the powers of the Commission or the Tribunal under the Act.

(b) Primacy of the *Canadian Human Rights Act*

Issue

The Act embodies fundamental values of Canadians. Though it currently does not expressly deal with this matter, the courts have said that the Act, like all human rights legislation, has "quasi-constitutional status." This means that the Act is almost as fundamental to our legal structure as the Charter, even though it is a law passed by Parliament like any other. Our concern is whether the Act should expressly state that the Act has primacy over other statutes and regulations, unless a clear exception to the Act is expressed.

Development of the Primacy Principle by the Courts

The concept of primacy has been developed by the courts when called upon to decide how to resolve a conflict between human rights legislation and another law passed by Parliament, often where that other law authorizes some government action that is alleged to breach the law. The courts have decided that where there is such a conflict, the human rights legislation takes priority, unless the human rights law creates a clear exception. Such exception may be in the human rights legislation itself, like the *bona fide* occupational requirement, or it may be in the other law, such as a provision therein that clearly states that it takes priority over the human rights law. It would require a very serious matter for Parliament to expressly override the fundamental values in the Act in this way.

In the 1985 case of *Winnipeg School Division No.1 v. Craton*, the Supreme Court of Canada unanimously stated a new rule of statutory interpretation to the effect that human rights legislation would have primacy over other laws in case of conflict, except where there is a "clear legislative pronouncement" to the contrary. This is now the basic primacy rule.

The rule has since been restated in other cases. In the 1996 Supreme Court of Canada case of *2747–3174 Québec Inc. v. Québec*, one judge noted that the Québec *Charter of Human Rights and Freedoms* — the Québec human rights legislation equivalent to the Act — prevailed over the Civil Code of Québec, all statute law and the common law because of its quasi-constitutional status.

Courts and tribunals have applied similar principles to conflicts between the Act and other laws.

Eight provinces and one territory have primacy provisions that basically codify the Supreme Court's statement of the principle. Nova Scotia has a "partial" primacy provision.

At least one federal statute has an express primacy provision. Section 82 of the *Official Languages Act* gives various provisions of that Act primacy over other Acts of Parliament and regulations. However, it specifically provides in section 82(2) that it does not have primacy over the Act itself or its regulations.

The concept of primacy serves two functions. First, it epitomizes the importance of the values enshrined in the Act and other human rights legislation. Second, it ensures that those values override discrimination authorized by another statute or regulation. The two functions are intertwined.

The effect of a finding of primacy is that it allows the Tribunal to deal with an allegation of discrimination in a complaint about a statutory service or employment condition just as it would any other complaint. Though the Tribunal clearly cannot make a binding declaration of invalidity like a superior court, it can order the government to cease applying a discriminatory law.

In our view the primacy provision does not have to be expressly added to the Act. It appears to be accepted without question by the courts and to be working well in practice. We think it makes sense to allow the Tribunal and courts to develop the primacy rule in future cases.

Where Discrimination is Required by Law

In the context of primacy, there are situations where an employer must obey a law that subjects it to a complaint of discrimination. For example, a statutory medical standard for a job might subject an employer to a complaint of disability discrimination. In this situation, the employer or service provider would be required to defend a discriminatory practice required by law. We think the government should be required to appear and provide the justification for the law or regulation, because it has all of the evidence about why the standard or rule is justified.

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This would allow the validity of a statute or regulation binding an employer or service provider to discriminate, to be tested at the same time as the liability of the employer or service provider is determined. Since many statutes and regulations apply industry-wide, it would allow for the examination of the systemic issue, requiring the government rather than an individual employer or service provider to justify the law.

Recommendation:

9. We recommend that where an employer or service provider is required by statute or regulation to apply a *prima facie* discriminatory rule, policy or standard, that the Act provide that the government be required to appear as a party to the matter to defend the statute or regulation.

This would allow the validity of a statute or regulation binding an employer or service provider to discriminate, to be tested at the same time as the liability of the employer or service provider is determined. Since many statutes and regulations apply industry-wide, it would allow for the examination of the systemic issue, requiring the government rather than an individual employer or service provider to justify the law.

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3

PART TWO: TOOLS FOR ADVANCING EQUALITY

CHAPTER 4

Introduction to the Human Rights Process

Issue

What sort of tools are needed to ensure equality in employment and service provision in the federal sector?

Current Organization and Compliance Mechanisms

In 1977, the Canadian Human Rights Commission was set up to enforce the Act. It does this in a number of ways.

The Current Complaint System

Individuals may file complaints about discriminatory practices prohibited by the Act.

The Commission itself may initiate complaints.

The Commission usually appoints an investigator to investigate a complaint. However, it has the discretion to refuse to deal with a complaint where it is of the view that:

- **(a) a grievance or other process established by Act of Parliament should be used instead of the process under the Act;**
- **(b) the complaint is outside the Commission's jurisdiction;**
- **(c) the complaint is trivial, frivolous, or vexatious or made in bad faith; or**
- **(d) the complaint was filed after the one-year limitation period and should not be accepted in spite of that fact.**

On the completion of the investigation, the investigator prepares a report which is disclosed to the parties for their submissions and then the report and the comments of the parties are given to the Commission for decision. Where those submissions raise fresh facts, then the Commission may re-disclose the materials for further submissions.

Based on the investigator's report and the submissions of the parties, the Commission may refer a complaint to conciliation, refer it to grievance or other procedures established by Parliament or dismiss it for the various other reasons listed above and, perhaps most importantly, for the reason that an inquiry into the complaint by the Tribunal is not warranted.

The Commission can also refer the complaint to Tribunal if "having regard to all of the circumstances of the complaint, an inquiry into the complaint is warranted."

The Tribunal must appoint a member to hear the complaint on receiving such a referral. The Tribunal hears the evidence and submissions of the complainant and the Commission and the respondent. It may dismiss the complaint or make an order for compensation, restoration of lost rights and preventative orders, if the complaint has merit.

Orders of the Tribunal may be enforced as orders of the Federal Court of Canada.

Guideline Making Powers

The Commission may make guidelines interpreting the Act, that bind itself and Tribunals under section 27, but do not bind the courts.

The Commission also has developed policies on its interpretation of the Act meant to assist interested individuals and organizations.

Assistance with Special Programs

The Commission may make general recommendations about desirable objects for special programs under section 16 and give advice and assistance on the adoption or carrying out of special programs.

The Commission can also approve plans submitted to it for the adaptation of services, facilities, premises, equipment or operations to the needs of disabled individuals. This makes the approved system immune from complaint.

Education

The Commission has a broad educational mandate.

The Act empowers the Commission to foster public understanding and recognition of the Act, to carry out research, carry out liaison with provincial commissions, consider and report to Parliament on human rights and freedoms issues raised by any source, carry out studies referred by the Minister of Justice and include findings and recommendations in a report to Parliament, review subordinate legislation and report inconsistencies with the Act to Parliament and use all appropriate means to discourage discrimination covered by the Act.

The Commission has carried out a number of studies concerning Aboriginal issues, access to public services and access to automated banking machines.

The Commission also provides public human rights education through publications, seminars and lectures and various other means.

Reports to Parliament

The Commission must provide Annual Reports to Parliament and may file reports on special issues if they are urgent, including reports on public pensions.

Other Regulatory Powers under the Act

The Governor in Council currently has significant powers to further the enforcement of the purposes of the Act.

Such powers include:

(a) setting maximum and minimum ages for employment for the purposes of the Act which are defences to complaints of age discrimination (only one such regulation exists and that is to establish mandatory retirement for the Canadian Forces);

(b) setting standards for undue hardship as limitations of the duty to accommodate (not used to date);

(c) specifying which distinctions in employment benefit plans should be immune from complaint (authorizes the *Canadian Human Rights Benefit Regulations*);

(d) setting terms and conditions that those wishing to have government contracts must comply with, providing for the prohibition of discriminatory practices and the resolution of complaints under the Act (not used — the contract compliance program is run by HRDC);

(e) setting accessibility standards for services, facilities, or premises which immunize a respondent from complaints if the standards are met (not used);

(f) making regulations on investigation procedures, the manner of investigation of complaints and the limits on the execution of search warrants in the interest of national defence or security (only two sets of regulations passed: *Customs and Excise Human Rights Investigation Regulations* and *Immigration Investigation Regulations*).

What is Needed for a Revitalized Act?

In our view, the Act should provide more tools for those seeking the resolution of equality issues than are available now.

The current process, for resource and other reasons, seems focused on the individual complaint system. This ties its resources to the priorities of complainants regardless of the potential benefit to other individuals besides the complainant. This tying up of resources and the institutional conflicts created by the various roles of the Commission must be resolved so that the Commission can set priorities in pursuit of the goals of the Act.

We are of the view that a number of tools have to be given to the Commission to achieve the goals of the Act:

- there must be a claims process that can handle disputes about equality issues quickly and expertly and that will provide representation for claimants;
- there must be a rule-making function to deal with questions that should not have to be litigated one barrier at a time;
- there must be a source of policy information about what the Act means and how to comply with it;
- there must be a system to ensure that all stakeholders can be involved in the overall human rights process;
- there should be a means of accumulating information on equality issues and their advancement;
- education must be a very important aspect of the Commission's activities;
- Canada has a role to play in international human rights;
- there should be an alternative dispute mechanism available;
- the Commission must be able to make the results of its activities known formally through reporting to Parliament.

We will deal with these tools in the upcoming chapters.

CHAPTER 5
Internal Responsibility Model

Issues

Most of the complaints the Commission receives are about discrimination in the workplaces within federal jurisdiction. Many of the employers have sophisticated human rights systems for dealing with human rights issues that arise. In contrast, some small federally-regulated employers may not even know that human rights legislation applies to them, let alone have mechanisms in place for creating equality policies and for resolving disputes among employees.

Our concern is whether there are positive measures that would assist employers and, to a lesser extent, service providers in creating an environment of equality within federal workplaces.

Part of this issue involves recognizing that many employers and employee organizations are already working towards creating workplaces based on mutual respect. It is usually better for both workers and employers if equality issues can be resolved in the workplace, with the Tribunal and the Commission remaining as an alternative if such efforts fail.

Resolving a human rights complaint in the context where it arises is beneficial. A workplace has a life and culture of its own that determines not only how the complaint arises, but also how the matter can be resolved and the workplace restored. There is considerable merit in having a dispute resolved in the workplace rather than having it become a claim before the Tribunal. There is also a benefit in having policies designed to implement the purpose of the Act, tailor-made to a workplace. Other benefits can be increased job satisfaction, lower turnover in the job, lowered costs due to less time lost because of the unhealthy environment created by conflict, fewer complaints to organizations outside the workplace, as well as generally creating a culture of tolerance and accommodation in the workplace.

Many human rights issues are already dealt with in the workplace. They arise in grievances under collective agreements that contain anti-discrimination clauses, complaints by employees to the employer about sexual harassment in breach of section 247.2 of the *Canada Labour Code*, as occupational health and safety issues under the *Canada Labour Code* or as barriers to hiring or advancement for large federal employers under the *Employment Equity Act*. Amendments proposed to the *Canada Labour Code* will consolidate the requirements of an employer to accommodate the communication needs of disabled employees (proposed section 122.3) and allow for regulations dealing with anti-violence initiatives.

In this Report, we explore adversarial and non-adversarial ways of resolving disputes, whether or not the duty to ensure equality has been met in any given situation. We also explore education, policy development and other means to achieve equality by cooperation and agreement where the adversarial approach is not the right instrument to achieve the purpose of the Act.

We also consider whether there are ways to involve employers and service providers further to capitalize on their interest and control in the workplace and their desire to comply with the Act for the benefits it brings to the workplace environment and their business.

The Legal Environment

The Act provides in section 65(1) that an employer or service provider is liable for a breach of the Act where the discriminatory act was committed by an officer, director, agent or employee. However, section 65(2) says that the employer or service provider is not responsible if three conditions are met:

- the organization did not consent to the discriminatory act;
- the organization exercised all due diligence to prevent the discriminatory act;
- the organization acted to mitigate or avoid the effect of the discriminatory act afterwards.

There have been some cases where the employer has been able to meet this test. In many others, however, the employer was unable to meet the requirements of the provision by failing to address these matters quickly, or through maintaining the right sort of policies, neglecting to enforce them at the time of the complaint. Some employers failed to conduct an investigation into an allegation of discrimination that had been brought to their attention.

The Act already recognizes the importance of workplace dispute mechanisms. Sections 41 and 44 give the Commission discretion to find that a referral of matters to grievance or other statutory processes is

more appropriate than the process provided for in the Act. This is a policy that can be expanded as well.

Liability for the Failure to Ensure Equality in the Workplace

The duty effectively created by the Act to provide a discrimination-free work environment has been in place since 1977. That much remains to be done to ensure equality is demonstrated by the fact that many complaints are still being filed about workplace discrimination. This suggests that further measures should be taken to realize the purposes of the Act in federal workplaces.

As stated earlier in our chapter on the Purpose of the Act, we believe the employer has ultimate responsibility for ensuring equality without discrimination for employees and applicants for employment in the workplace. This is the case under occupational health and safety legislation. The employer has control over the workplace. In our view, responsibility should follow control. Such control may extend to the way employees are treated if away from the workplace. The employer should be responsible to the extent that it has control either within or outside the regular workplace.

Further, in *Central Okanagan School District No. 23 v. Renaud* (1992), the Supreme Court of Canada held that a union can be liable with employers for discrimination against employees in two ways. First, it may be liable if it jointly sets the discriminatory work rule, in a collective agreement for example. Second, it may be liable if it impedes the reasonable efforts of an employer to accommodate.

In our view the importance of the employer's control over the workplace supports reinstating the full statutory liability principle developed by the Supreme Court of Canada in the *Robichaud* case in respect of the Act as it stood before the addition of section 65 described above. In the *Robichaud* case, various arguments were made that an employer should not be liable for the sexual harassment of the employee by her supervisor. The Court wrote: "Indeed, if the Act is concerned with effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy — a healthy work environment." The liability of the unions as developed by the Supreme Court of Canada in *Renaud* should also be recognized.

The defence in section 65 described earlier that allows an employer to escape liability for a discriminatory act has seldom assisted employers and we are of the view that it should be abandoned in favour of the doctrine of full liability as stated in the last paragraph. However, we think it is time to consider something that would be more effective in dealing with these issues in the workplace. Our starting point is this statement of liability. The next step is a consideration of an internal responsibility system and the way that employers and service providers may be able not only to avoid liability if their system can be shown to be functioning effectively, but also to create a culture respectful of human rights that we hope may generate fewer complaints.

Expert Meeting on Internal Responsibility Models

We conducted a one day meeting with experts in the labour and management fields to obtain practical, first-hand, technical information on how internal responsibility systems are working.

Based on the experience gained from existing systems we believe there are a number of features that are necessary for an effective internal responsibility system. While these features are important, most experts felt that a single model would not work for all workplace environments and that it would be important to have flexibility in an internal responsibility system so that it could be adapted to different workplaces.

Features of an Effective Internal Responsibility System

The various models we reviewed showed varying degrees of labour-management cooperation. However, the different models contained features that deserve consideration. Each reflected the degree to which management viewed anti-discrimination matters as disciplinary matters and the degree to which labour and management have agreed to share control of this aspect of the workplace. In the models we reviewed, the current state of internal compliance with the Act appears to be in a state of development.

(a) Management-Labour Cooperation

We think a joint management-labour approach is essential. The Supreme Court of Canada has held that the employer and unions may be jointly liable for discrimination on some issues. The joint occupational health and safety committees function well so there

would not seem to be a major problem in introducing such a system to deal with a similar workplace issue.

However, the joint committee structure might not fit well with the current state of management-labour sharing of responsibility for the development of equality policy and processing discrimination complaints in some federal workplaces. It might take some time to make the joint committee structure feasible, depending on the current state of labour-management cooperation about such issues.

At this point, we are of the view that there must be cooperation between employers and employees and their organizations. We hope that this system will move, either by collective agreement or by legislation, towards a joint model.

(b) Policies and Programs Promoting Equality Development

Cooperative policy development to ensure the advancement of equality is important even where the employer retains ultimate responsibility for the policy. Labour involvement is necessary to ensure that all parties "buy-in" to the policy.

We think it is important that such policies have the commitment of senior management so that there is more likelihood for compliance. The employer should have written policies and publicize them or ensure that they are added to collective agreements to make certain that senior management commitment is made clear.

(c) Training and Education Should be Provided to All Managers and Employees

Understanding of the goals of the Act and training in equality matters are essential to the promotion of equality in the workplace. One of the organizations that provided submissions about their programs included participation of community groups as one way of developing workplace diversity in connection with employment equity work.

(d) Mechanism for the Internal Resolution of Complaints of Discrimination, Including Effective Remedies for Discrimination and a Right to Refuse Work in Very Serious Cases

Many workplaces will have collective agreements that provide a means for dealing with disputes. This might be supplemented with a system for the investigation and early resolution of disputes through alternate dispute resolution (ADR). A remedy could include the right to refuse work in very serious cases, as with health and safety issues.

There might be some concern that a committee composed of union and management could not impartially investigate a complaint. If this is the case, the system might at least provide a system for referring individuals to ADR. The early resolution of complaints in the workplace could help reduce the number of claims that are brought to the Tribunal.

The current referral provisions in the Act suggest that the idea of respect for workplace complaint resolution processes has been important in the policy underlying the Act from the beginning.

This scheme would not interfere with the employer's right to discipline an employee who was found liable for discrimination.

Individuals will always be able to choose to go to the Tribunal even if they have used the local complaint resolution process provided by the employer. The possibility of multiple proceedings about the same subject matter will be dealt with in chapter thirteen.

(e) Senior Level Commitment for the Internal Responsibility System

Experience has shown that commitment from both senior management and labour has been very important in ensuring compliance.

(f) Monitoring and Documenting Equality Issues in the Workplace

This is a very important function as problems can be spotted in the workplace by the people who know it well. This could be very important for systemic discrimination issues because employees and managers will be best placed to identify the values and assumptions that create barriers in the workplace. This requires some training in spotting such barriers. The monitors might also be the same people who evaluate the employer's work force for *Employment Equity Act* purposes, to identify barriers to hiring and advancement of members of the designated groups. Internal studies and monitoring have been effective in discovering problems in the workplace. The findings of discrimination in the *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* case *(Action Travail des Femmes)* in the Supreme Court of Canada were supported by an internal report prepared for the employer.

The resolution of disputes should be monitored to ensure not only that the matter has been finally and

fairly settled, but also that the appropriate lessons have been learned and changes made so that the issue does not arise again.

The committee could also monitor any Tribunal orders made against the employer and report on the matter to the Commission. Compliance with Tribunal orders is something in which both the employer and employees have an interest because they can be enforced as orders of the Federal Court of Canada. The workplace committee could also monitor the effectiveness of the employer in complying with Commission guidelines.

However, the Commission would retain ultimate responsibility for monitoring Tribunal orders for compliance.

(g) Maintaining Liaison with the Commission and Other Sources of Information About Human Rights in the Workplace

The new Commission will provide guidance to employers and service providers about how to comply with the Act in various forms. The workplace committee could be the point of communication between the Commission and the organization for the purposes of providing up-to-date Commission policy material. The committee would also be the obvious body to participate in such projects as the development of Codes of Practice. The Commission might be able to help with training.

(h) Monitoring Effectiveness of Equality Programs and Procedures

Information from employees about how the employer's programs and policies were working could be a valuable resource.

(i) Recognition of the Efforts of Those Making the System Work

Management and employees should be paid for the time they spend implementing and carrying out the functions of the internal responsibility system. They should also be protected from retaliation and liability while carrying out their functions.

Other Models The Panel Considered

(a) The Joint Health and Safety Committee Model

The joint health and safety committee is a means of bringing about "internal responsibility" which is the basic principle of the occupational health and safety legislation in Canada. Joint occupational health and safety committees are required by legislation or subject to ministerial discretion in all Canadian jurisdictions, subject to certain exemptions based on factors such as size of work force. The concept continues to evolve in the federal jurisdiction with recently proposed amendments to the *Canada Labour Code* to require large employers to have both a joint workplace health and safety committee, with expanded duties, as well as a policy health and safety committee. This committee provides an interesting model for an internal responsibility structure for human rights.

These committees typically:

- participate in development and implementation of employee safety and health programs;
- deal with employee complaints and suggestions concerning safety and health;
- ensure the maintenance and monitoring of injury and work hazard records;
- monitor and follow-up hazard reports and recommend action;
- set up and promote programs to improve employee training and education;
- participate in all safety and health inquiries and investigations;
- consult with professional and technical experts;
- participate in resolving workplace refusals and work stoppages;
- make recommendations to management for accident prevention and safety program activities, and monitor effectiveness of safety programs and procedures.

(b) Modified Health and Safety Committee

In one case, a workplace committee composed of members selected from both labour and management had evolved through the collective bargaining process to focus on harassment broadly defined in the context of "respect at work." This workplace committee resembles the joint occupational health and safety committee. The overall committee structure is made up of local workplace and national committees. The fact that senior management and labour participate accounts for its success. The committees develop anti-discrimination and employment equity policies, jointly and confidentially investigate and resolve complaints (unresolved complaints can go through the grievance process and to the human rights commission) and carry out programs aimed at the workplace and outside. The policy and the

collective agreement also provide for the right of an employee to refuse work in serious cases. There is training for officials and employees. The payoff for the employer is greater workplace harmony, improved morale, reduced leave, reduced friction and the reduction in the number of formal human rights complaints to the Commission.

(c) Employer-initiated Program

In another workplace, an employer retains greater control over the way human rights issues are dealt with. A "respect at work" program was developed with union collaboration to ensure union support, though the policy and discipline remain the responsibility of the employer. No committee processes individual complaints. The collective agreement forbids discrimination, but the policy goes further, creating a zero tolerance of harassment. The program provides for management and labour "monitors" to monitor complaints, and employees are given training and the right to refuse to work in serious cases.

(d) National Employment Equity Committee Variation

In another workplace, the mandate of the national employment equity committee was extended to deal with some human rights issues, but on a policy basis, not on the basis of joint complaint resolution. Complaints of harassment are dealt with more traditionally as a disciplinary matter. Local committees provide policy input.

(e) Non-unionized Environment

In a non-unionized environment, one corporation created a diversity management committee with important policy, monitoring and accommodation functions. The human resources department looks after complaints.

Consultations and Submissions

Some employers said that the approach to developing internal responsibility for workplace human rights issues should vary for each workplace. In some cases, joint committees can be developed in a collective bargaining context. However, other employers prefer to control human rights policy, involving labour in varying degrees, but retaining control over the complaints process as part of workplace discipline.

Some unions argued that the Act should require employers to establish mandatory human rights committees, similar to those established under the *Canada Labour Code* for health and safety purposes. Committees would be composed of representatives from the employer and unions who would be properly trained for their duties. Committees would be responsible for both complaints of discrimination and the development of policy, and act as a vehicle for human rights training and education. They would not supplant the process in the Act, but complement it. They would be proactive in identifying discriminatory barriers to equality in the workplace to prevent complaints.

The Labour Program at HRDC thought the idea of proactive joint labour-management committees to promote human rights and prevent discrimination was worthy of serious consideration. In its view, the strength of the Occupational Safety and Health Committee lies in its legislative mandate, responsibilities and powers. The disadvantage of trying to adapt this model is that the area of responsibility is restricted to health and safety matters and so is more manageable, though they acknowledge that this is broadening to include a concern for disability issues. They believe that the Employment Equity (EE) Committee model might be a good one for human rights functions since the subject matter of the committees would be similar. The disadvantage of using the EE Committee as a direct model is the lack of the legislative mandate, responsibilities and powers. The *Employment Equity Act* does not require a committee for the purposes of that legislation. However, in its *Guideline 3: Consultation and Collaboration* for compliance with the *Employment Equity Act* (EEA) developed in close consultation with the Commission, the Labour Program (HRDC) suggests setting up joint labour management EE Committees as an option employers could use to meet their consultation and collaboration requirements under the EEA. The Labour Program and the Commission submitted that human rights committees could have a role in dealing with systemic discrimination, education about human rights, working proactively with the employer to identify barriers and handling internal complaints.

Discussion

Many of the features of a workplace health and safety committee could be adapted to a workplace human rights committee to deal with equality issues in the workplace. The committee would benefit from a combination of the practical knowledge of the workplace of labour and the knowledge of the policies and business

direction of management, similar to health and safety committees. An employment equity committee, if one exists in the workplace, might also be adaptable for this purpose.

The presence of such committees could create a focal point for human rights issues — policy, training and complaint resolution — right in the workplace.

The monitoring and policy functions could support a systemic approach to dealing with issues in the workplace.

Some employers may see this as another burden imposed by government on them. However, federal employers with over 20 employees must have joint health and safety committees (those with between 5 and 20 must have health and safety representatives) and those with over 100 employees may have joint committees for *Employment Equity Act* purposes. The functions of these committees may overlap and any proposed committee structure could take this into account. Ultimately, the cost of creating and operating the internal responsibility mechanism should be offset by the costs of the litigation it could avoid and the benefits of greater workplace harmony.

Such a committee might not be as easy to develop and implement in a non-unionized workplace as an organized one. However, the structure of the committee might be such that it fostered sufficient workplace democracy to make it work.

The Incentive for the Employer

We believe that employers would be better off with an internal responsibility system in place.

We believe that where the employer can show that it has an effective internal responsibility system in place for the resolution of complaints that incorporates all the elements of the internal responsibility system described above, a claimant before the Tribunal might be required to show why this system failed to deal properly with the human rights issue in his or her claim before being allowed to proceed further. (This will be dealt with in the multiple proceedings section, chapter thirteen).

We think there should be some benefit to the employer in implementing this new system. We see this as an improvement on the current scheme in section 65 of the Act where an employer can avoid liability for the discriminatory acts of employees by taking care of the matter properly itself.

We also recognize that the benefits of this system will flow to an employer's current employees and not to job applicants and customers who are not part of the workplace. However, the policy development part of the system may be able to assist the employer with issues concerning job applicants. The issue of the use of an internal responsibility system for service matters will be dealt with at the end of this chapter.

Should the Committees be Mandatory?

We asked ourselves whether we should recommend that the Act impose an internal responsibility system on employers or whether employers and employees and their representatives, if any, should make a decision about what would be most effective in each workplace.

Employers argued that each workplace is different and that the development of their particular approach to equality matters is unique. They said the time is not ripe for a specific model and that the lesson derived from the health and safety area is that this is a matter that should be allowed to evolve.

We are concerned about the effect of imposing a joint workplace human rights committee structure on employers. It is not clear that a jump from no internal responsibility scheme to the requirement for a joint committee structure is appropriate at this time.

We are of the view that all employers with over five employees, following the *Canada Labour Code* requirements, should be required to establish an internal responsibility system with the features listed earlier. Also to be consistent with the approach in the Code, the system for employers with between 5 and 20 employees should reflect the capacity of the smaller workplace to set up a system. This would allow the employer and employees and their representatives to work out the details of the actual system within the workplace. This could be coordinated with the health and safety committee or the employment equity committee to ensure the best fit for the particular workplace.

The requirement for an internal responsibility scheme should be established in the Act together with the elements of the scheme listed above. Commission guidelines could also fill out the model.

Training would be essential because equality issues are still evolving. The Commission's policy and education functions would be very important to ensure that these committees can carry out their jobs.

This system could be reviewed in connection with the five-year review we are proposing for the Act.

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Equality Issues in the Provision of Services

The committees could also consider equality issues in the services provided by the employers to the public. Though there would be somewhat less justification for involving labour in these concerns, the services are delivered by the employees who would therefore be very interested in how the services could be delivered without discrimination. However, there should be some method for separating service policy issues that are determined by the business plan of the employer, unless there is some other justification for involving employees.

Recommendations:

10. We recommend that the Act make employers and service providers liable for the acts of their employees to the extent that the employer controls the workplace that they work in, whether in or outside of the normal workplace.

11. We recommend that the Act require all employers with more than five employees to establish an internal responsibility system to deal with human rights matters within their control. The situation of employers with between 5 and 20 employees should be recognized as it is in the occupational health and safety system.

12. We recommend that the requirement to have an internal responsibility system and the elements of this system be established in the Act with the following minimum elements:

- **(a) management-labour cooperation**
- **(b) policies and programs promoting equality development**
- **(c) training provided to all managers and employees**
- **(d) mechanism for the internal resolution of complaints of discrimination, including effective remedies for discrimination, and a right to refuse work in very serious cases**
- **(e) senior level commitment**
- **(f) monitoring and documenting equality issues in the workplace**
- **(g) maintaining liaison with the Commission and other sources of information about human rights in the workplace**
- **(h) monitoring the effectiveness of equality programs and procedures, and**
- **(i) compensation and protection of employees engaged in the work of the system.**

13. We recommend that the Act provide that where the employer can show that it has an effective internal responsibility system in place for the resolution of complaints, the Tribunal may dismiss a claim unless the claimant proves that this system failed to deal fully with the human rights issues raised by the case or failed to provide an adequate remedy.

14. We recommend that the internal responsibility system also deal with equality issues in the provision of services by that employer to the general public.

15. We recommend that this internal responsibility system be reviewed when the Act is reviewed after five years of operation to determine whether adjustments should be made.

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CHAPTER 6
Regulatory Compliance Scheme

Issue

The Panel considered whether and how the Act should use regulatory power to ensure equality in workplaces and in the provision of services.

The Act

The Act currently gives considerable power to the Governor in Council (Cabinet) to make regulations to further the goals of the Act. Such regulations are law.

These powers include:

(a) making regulations (which are defences to complaints of age discrimination) that set maximum and minimum ages for employment for the purposes of the Act (one such regulation protects the Canadian Forces' mandatory retirement policy);

(b) setting of standards for undue hardship as limitations of the duty to accommodate (this has not been used to date);

(c) specification of which distinctions in employment benefit plans should be immune from complaint (authorized by the *Canadian Human Rights Benefit Regulations*);

(d) setting terms and conditions with which those wishing to have government contracts must comply, providing for the prohibition of discriminatory practices and the resolution of complaints under the Act (this is not used — the federal contract compliance program is run by HRDC);

(e) setting accessibility standards for services, facilities, or premises that immunize a respondent from complaints if the standards are met (not used). No complaint can be filed if there is compliance with the standards. Proposed regulations would be published in the *Canada Gazette* and interested persons would be given a reasonable opportunity to comment;

(f) making regulations regarding investigation procedures, the manner of investigation of complaints and the limits on the execution of search warrants in the interest of national defence or security (only two sets of such regulations have been passed: *Customs and Excise Human Rights Investigation Regulations* and *Immigration Investigation Regulations*).

The Guidelines

The current Guidelines are binding on the Commission and the Tribunal but not the courts. Until June 1998, the Act empowered the Commission to create the Guidelines, which are binding interpretations of the Act in either classes of cases or individual cases. The June 1998 amendments removed the power to make binding Guidelines for individual cases. There are very few Guidelines. The most important, and those most recently passed by the Commission, are the *Equal Wage Guidelines, 1986*.

Concerns about institutional bias have arisen from the fact that the Guidelines are made by the Commission and bind the Tribunal before whom the Commission appears as a party. In one case, *Bell Canada v. Canadian Telephone Employees Association* (1998), a judge of the Trial Division of the Federal Court said in passing that these Guidelines created an appearance of bias.

Although it is not clear why these rule-making powers were not used more extensively, resource requirements and concerns about bias may have been important factors.

Consultations and Submissions

We heard a number of submissions regarding the regulatory power.

"[...] Regulations are an extremely important vehicle for preventing discrimination. It is unclear why no regulations have been enacted which are specifically aimed at removing barriers faced by persons with disabilities. What is clear, however, is that regulations which contain clear and precise standards for accessibility will establish a floor of human rights protection, reduce litigation and provide much needed guidance regarding human rights obligations. The clear and precise standards provided under the Americans with Disabilities Act have been demonstrated to be effective at barrier removal." (Council of Canadians with Disabilities)

"Even with landmark cases, individual citizens must bear sole responsibility to fight for their rights if a school, hospital, business employer or government department does not provide access. This is costly in terms of time, money and energy." (The Canadian Hearing Society / *La société canadienne de l'ouï*)

" 'People with disabilities are our parents, brothers, sisters and spouses, as well as our colleagues, our friends, our neighbours and ourselves.' It is not difficult to document the impact of the barriers that Canadians with disabilities face in their daily lives.[...] For First Nations peoples, racial minorities, and women with disabilities the situation is much more critical.[...] The Commission should be provided with mechanisms enabling it to assume a greater enforcement role in the areas and jurisdictions covered by the *CHRA*." (The Canadian Association of Independent Living Centres)

"Sections 16 through 19 of the Act attempt to provide the Commission with a quasi-regulatory role in the area of barrier removal. However, these sections are framed within the context of formal equality, providing avenues that "may" be used, and "may" be of benefit to people with disabilities and other disadvantaged groups. Section 16 refers to "special programs" [which] is entrenched in a non-inclusive view of the world. We do not want "special programs"; we simply want to be included. The failure of these sections to promote equality and equal benefit is rooted in their design.[...] We believe that sections 16–19 should be replaced with a new section specifically designed to remove barriers to inclusion and equal benefit. The Act should be revised to include a strong standard setting and regulatory role for the Commission, designed to truly promote inclusion and remove barriers." (Coalition of Persons with Disabilities & Independent Living Resource Centres)

"The Commission should be given the mandate to initiate the regulation making process based on its identification of systemic barriers in the same way that the Canadian Transportation Agency does. Such regulations will contain clear goals and achievable timeframes for compliance." (Council of Canadians with Disabilities).

The Panel's Views

The Panel's view is that standard-setting or rule-making powers are important supplements to the claims process. We believe that the Act should continue to have a variety of binding and non-binding instruments containing transparent standards to guide employers and service providers about how to ensure equality. We also think these powers should be used more extensively than in the past.

The claims process will not be sufficient by itself to achieve equality. That process deals with one situation at a time and operates only after discrimination has already occurred. We heard quite forcefully that the responses to lessons learned from the rulings of human rights decisions are either too slow or insufficiently national in scope to break down barriers more quickly. Binding and non-binding standards can eliminate these barriers more quickly. They also provide employers and service providers advance notice of what is expected of them and eliminate uncertainty. They also play an important educational role.

We were moved by the statements from members of the disabled community about the barriers that remain in their way to full participation in the workplace and elsewhere even after decades of experience with the application of human rights legislation in all jurisdictions throughout Canada. Binding or non-binding rules are a means of remedying discrimination and promoting equality. They are very effective in addressing systemic discrimination as the development of the rules provides a process that involves all interested parties.

We heard about various forms of barriers for the disabled. Though many buildings are now accessible, many more are not, and even those that are may not be fully accessible. There may be a ramp outside the building, but stairs within. An office tower without Braille markings on the elevator or an electronic voice announcing the floor presents a physical barrier to the blind. A fire alarm system that does not have a visual display is a danger to the deaf or hard of hearing. Public announcements in train stations and other public facilities are not of much use to individuals with a hearing impairment. Information provided to the public may not be in accessible formats such as Braille, large print or audio, or it may take a long time to obtain this information. Office equipment, technology or modular furniture must be designed to eliminate barriers. Some pervasive barriers cannot be seen, such as employment policies designed without taking the needs of people with disabilities into account. Application forms may require the disclosure of irrelevant information or present a barrier themselves to those with a learning disability.

Participants in our consultations stated that the Supreme Court of Canada's ruling in *Eldridge v. British Columbia* (1997), requiring sign language interpretation to be provided by the province to the members of the deaf community to ensure adequate communication with health professionals, has not been implemented

across Canada, though the principle applies in every jurisdiction.

We heard from the Council of Canadians with Disabilities that regulations are needed in the areas of accessibility to banking services, including automated banking machines, accessibility to government information, and accessibility to web sites on the Internet. The Commission reports in its 1999 Annual Report that the Canadian Standards Association has completed technical and design standards for accessible automated teller machines. But it only expresses the "hope" that manufacturers and all service providers, not just federally regulated institutions, will move quickly to introduce the machines across Canada once the standard is adopted. The Commission also notes that it continues to receive complaints about inaccessible transport services and facilities, particularly from those who have difficulty accessing information and those who use mobility aids. The Commission notes that the lack of access to teletypewriter facilities in airports, railway stations and booking services is another area of concern. The Report states that both the Commission and the Canadian Transportation Agency have received complaints about this issue and are considering how best to deal with it.

The view of the Panel is that regulations are required on the issue of accessibility in order to create certainty and uniformity, quickly. However, regulations are not needed in every area covered by the Act. The issue of accessibility is one that lends itself to this approach. The needs of the disabled are well-known and understood and the solutions are available. We believe that there are other areas like accessibility where the problem and the solutions are clear and where regulations could bring about change rapidly and uniformly.

The next question is who should make these regulations. The power in the Act to make this kind of regulation, as in most cases in our Parliamentary system, is vested in the Governor in Council.

We considered whether the Commission could be given the power to make such regulations. Some agencies such as securities commissions have been given the power to make rules themselves. The power to make regulations can be given with safeguards to ensure that the Commission stays within the scope of the powers that Parliament deems to be appropriate. This can be done by specifying the kinds and scope of regulations that can be made, the nature and scope of the consultations an agency must carry out and the power to override the government retains to ensure that the agency does not go too far.

Something similar was done in the June, 1998 amendments to the Act having the Commission carry out consultations and report with respect to regulations prescribing standards for assessing undue hardship, though the regulatory power itself remains with the Governor in Council. The Act provides that the Governor in Council can go ahead and make the regulations if it has not received the report of the Commission within six months of the publication of the draft regulations in the *Canada Gazette*.

There might be concern, however, that the Commission may not be the appropriate body to make regulations because it acts as an advocate. This should not in reality be a serious conflict if the Commission is seen as the enforcing agency for an Act that advocates equality.

If it is not the Commission, then we believe that the Minister of Justice, who is the Minister of the Crown with responsibility for the Act, should be empowered to make regulations. We believe that these regulations should be pursued by a Minister who is willing to champion the cause of equality.

Whoever may have the ultimate power to make these regulations, the Commission should play an important part in the research and development of where and what kind of regulations are necessary. The Commission should educate the public and the government about its findings. This role could be fulfilled with the current powers of the Commission to carry out research and to use any means possible to ensure equality. The power to conduct inquiries that we will recommend will also be of assistance in this function.

The Commission should be consulted in the development of such regulations. It has the necessary expertise and the institutional role as promoter of equality to be of great assistance.

The Commission could use the claims process to enforce the regulations. However, an audit power might produce better results because the standard set by regulations should be clear enough to make inspection a powerful enforcement tool. The audit power might be given either to the Commission or to some other body that has the resources and the trained officials and independence to do the work effectively.

The Commission has already built up experience in doing accessibility studies and reports on accessibility issues. In the early 1990s, it studied the physical accessibility to federal government facilities across Canada,

the availability of government publications in alternate formats, the availability of telecommunications services for the deaf in federal departments, the accessibility of banking services — the instant tellers in particular — and the accessibility of postal outlets. The reports indicate that some work had been done, but much more remained in almost all the areas that were studied.

We also see a clear need for coordination with other regulators who have the power to create regulations that deal with equality issues. For example, the Canadian Transportation Agency administers regulations and non-binding Codes of Practice on accessibility matters to remove undue obstacles from the federally regulated transportation network (for air carriers, airports, passenger rail carriers and stations, interprovincial ferries and terminals). The *Canada Transportation Act* requires that the Agency and the Commission coordinate their efforts. There are *Air Transport Regulations* (for air carriers operating aircraft with more than 30 seats, requiring the provision of specific information and services) and the *Personnel Training Regulations* (1995) which require air, rail and marine carriers and terminal operators to ensure that employees and contractors who provide transportation-related services have the knowledge, skills and awareness they need to help passengers with disabilities effectively and sensitively.

Codes of Practice

Codes of Practice are a non-legally binding way of developing standards for achieving equality. They can deal with equality issues for large groups of employers and service providers by providing cooperation in their development and uniformity and certainty in the standards that they set. They cannot be the subject of enforcement proceedings in the same way as regulations, though the failure to comply could be the basis for a Commission-initiated claim before the Tribunal.

These Codes are usually developed in a public, consultative process involving employers, service providers, equality-seeking groups, experts and other interested persons. They can be developed without a specific process, or they can be developed in a formal standard-setting process.

The Canadian and Australian governments have set out information on the components of effective codes and how to create them. The components include a "plain language" statement of code objectives; clear, concise obligations; a range of information-oriented provisions governing compliance; provisions creating positive inducements for parties to comply; provisions creating penalties for non-compliance; dispute resolution provisions; periodic review and amendment; and, financing and commitment of key human resources.

The Canadian Transportation Agency has been involved in developing Codes of Practice as well as regulations. Codes of Practice have been developed in consultation with organizations representing the interests of the disability community, seniors, manufacturers, carriers and service providers. The Agency says this helps to develop compliance policies that respond to new technologies and new ways of providing services. Such policies set out minimum standards. The Agency says it can implement Codes more quickly than regulations. It reports that industry has committed itself to implement these Codes. There is an Aircraft Code and a Rail Code. Transport Canada has developed a Bus Code for inter-city buses. A new Code on accessibility of ferries was issued last year. The Accessible Transportation Program monitors industry compliance with the regulations and Codes by conducting surveys, inspecting sites and investigating complaints. The Aircraft Code is evaluated using benchmarks established about the same time as the Code.

The Agency is also participating in the modernization of the national Canadian Standards Association Barrier Free Design Standard (B561) for accessible buildings and other CSA accessibility projects. The Agency has also produced an Air Travel Guide for Persons with Disabilities and Seniors to smooth access to air travel. An Accessibility Advisory Committee provides input on the development of the Agency's regulations and Codes of Practice and industry guidelines through discussions or written comments. Committee members include representatives from the transportation industry and from the disability community, together with other interested persons.

The Council for Canadians with Disabilities has expressed concern that Codes of Practice are not law and therefore not as enforceable as the Regulations. However, they note that they do not yet have significant experience with the Codes of Practice to tell how effective these will be.

The Panel believes that Codes of Practice can be useful in supplementing the claim and regulatory processes to fill in detail about how to comply with the Act. The Act should empower the Commission to develop Codes

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of Practice with interested persons, where regulations are not the clear answer.

The Policy-Making Process

The Act gives a number of powers to the Commission that support its policy-making role. The policy-making role should be described as the capacity of the Commission to make policy statements that are meant to fill in gaps in the understanding of the Act. It might be said that the current Guidelines are a policy-making power. However, they have been discussed under the heading of regulatory power because they do have the force of law.

Policy statements do not have the force of law, though they would represent the expert opinion of the Commission on the Act and should be treated with considerable respect by the Tribunal and the courts.

Policy statements aid with compliance because they fill in details that the Act itself cannot provide. They give employers and service providers greater information about their obligations under the Act. They provide greater information to individuals about what they can expect from employers and service providers and how to enforce those expectations. The Tribunal would likely find them persuasive as an authoritative interpretation of the Act.

Policy statements can be made and amended with greater speed than regulations or Codes of Practice. They are based on the considerable expertise that the Commission has or can bring to bear on an issue. Policy statements carry greater weight and can be assured of greater compliance if they represent the shared views of all interested parties gathered through various consultation processes. The Commission could use the Advisory Council that we will recommend later in this Report either to supply input from interested parties or to suggest how more broadly based consultations could be held.

It is the Panel's view that the Commission could play a national coordinating role in the development of common elements of human rights policy in Canada.

Recommendations:

16. We recommend that the Regulation power under the Act should be maintained and that regulations governing accessibility are necessary.

17. We recommend that regulations be made to create standards for equality in areas where the value of standards and the kinds of standards required are clear.

18. We recommend that the Commission be given power to make these regulations, subject to such controls as Parliament places on the power, such as notice and consultation. If the Commission is not given such a power, then we recommend that the Minister of Justice, as the Minister of the Crown responsible for the Act, propose such regulations for passage by the Governor in Council. We recommend that the regulations be enforced through an audit system, perhaps tied to a government audit program to maximize the use of government resources.

19. We recommend that the Commission be given specific power to engage in making Codes of Practice and Policy Statements to clarify compliance with the Act and to educate the general public about the issues and their solutions.

20. We recommend that these various powers be used more extensively than the comparable existing powers have been used.

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CHAPTER 7
An Inquiry Power

Issue

We examined whether there is a need to improve the information-gathering mechanisms currently provided in the Act, given that that the purpose of the Act has evolved since it was passed in 1977.

The Act

The Act currently empowers the Commission to carry out studies and research to further the purpose of the Act. Section 27 requires the Commission to undertake and sponsor research programs relating to its duties and the purpose of the Act. It may consider recommendations, suggestions and requests received from any source, and report on these as well as its own comments to Parliament. The Commission must carry out studies on human rights issues referred by the Minister of Justice and include the results and any recommendations in a report to Parliament. It is also empowered to use any means, including publicity, that is consistent with its duties under the Act, to discourage behaviour prohibited by the Act. The Commission is also required to carry out consultations on regulations proposed to set standards for assessing undue hardship.

The Act also allows individuals to trigger a process of investigations into specific practices by filing a complaint with the Commission. The Commission may also commence such a process by initiating a complaint. The Act describes the type of hearing that the Tribunal provides for a complaint as an "inquiry." Thus, Parliament has already recognized that information-gathering is necessary to carry out the purpose of the Act.

In its 1999 Annual Report, the Commission states that individual complaints are not always the most efficient way to achieve change. An alternative suggested is the authority to undertake inquiries with respect to specific issues.

Discussion

The current type of inquiry authorized by the Act dates back to 1977. We now understand that inequality can be based on patterns of disadvantage which are linked to assumptions and stereotypes about who can do a job or about who has access to services. Barriers sometimes arise as an unintended consequence of common, everyday methods of operation. These barriers are often difficult to detect unless the method of operation is examined closely. In addition, underlying values and assumptions may be widely held, and as a consequence may be difficult to examine.

One way to deal with these barriers might be to file complaints about them and bring them before the Tribunal one at a time. However, in many cases, employers and service providers may have already started to work to remove these barriers. In other cases, the barriers and their remedies may still need to be identified. These barriers might occur throughout an entire industry or government.

Inquiry powers are often given to agencies that have wide-ranging responsibilities for standards of conduct. They are used in the human rights context in various jurisdictions, for example, in Australia, the United Kingdom and the United States.

Inquiry powers are also commonly used in other areas where the government needs information to deal with certain kinds of problems. For example, an area closely related to human rights is section 138 of the *Canada Labour Code*. This section empowers the Minister to cause an inquiry into occupational safety and health in any employment to which that part of the Code applies. The Minister may appoint one or more persons to conduct the inquiry, with the powers of a commissioner set out in the *Inquiries Act*. Section 108 of the Code empowers the Minister to appoint a commission, called an Industrial Inquiry Commission, with the same commissioner powers, to inquire into and report on a dispute or difference between an employer and employees, existing or apprehended, in any industry covered under the Code.

Under section 48(1) of the *Telecommunications Act*, the Canadian Radio and Telecommunications Commission (CRTC) may decide to inquire into and make a determination with respect to anything prohibited, required or permitted to be done under certain parts of its legislation or any special Act. Under section 70(1), the CRTC may also appoint any person to inquire into and report to the Commission on any matter within its jurisdiction.

Section 170(1) of the *Canada Transportation Act* (CTA) authorizes the Canadian Transportation Agency to make regulations for the purpose of eliminating undue obstacles to the mobility of persons with disabilities in the transportation network. Regulations can be made with respect to the physical design of the facilities or the training of personnel employed in them.

Pursuant to section 172 of the CTA, upon receipt of a complaint with respect to the federal transportation network, the Agency may conduct an investigation to determine whether there is an undue obstacle. Complaints may also be made with regard to matters for which a regulation could be made. If the Agency finds an undue obstacle, it may require appropriate corrective measures or direct that compensation be paid for any expense incurred by a person. In 1995, a complaint related to the communication of information to persons travelling by air who are blind or have low vision triggered the Agency to conduct consultations and develop recommendations to the industry on this issue. It should be noted that the CTA deals with industry based complaints, unlike the CHRA complaint system that usually involves an allegation against one particular company.

The Panel's View

It is the Panel's view that the research and information-gathering powers in the Act should be clarified to allow the Commission to undertake inquiries on specific issues in order to advance the principle of equality. Let it be clear that we are not recommending a "fishing expedition" to find out whether a claim should be initiated by the Commission. However, in some situations a claim might flow from an inquiry, but this cannot be the focus of the inquiry process. We think that the claims process is still the appropriate place for resolving disputes concerning specific practices of particular employers or service providers to ensure equality for employees and consumers of services. However, we believe that there will be some situations where a broader focus would be appropriate. The Commission should be given sufficient powers to ensure that it can get the necessary information. In these situations, the outcome should not be a mandatory order, but rather recommendations for solving an on-going problem. The inquiry, of course, could not result in the determination of civil or criminal liability. The rules of procedural fairness naturally should apply.

We think an inquiry power would be an appropriate mechanism for the Commission for dealing with broad issues such as patterns of systemic discrimination, particularly when those patterns extend beyond any particular business or organization. In such cases, a broader inquiry avoids singling out one organization when the pattern may be common to similar businesses and organizations. The Commission could also be empowered to commence an inquiry when asked to do so by the Minister. This could be a useful device for the Minister to inquire into human rights issues that require an independent approach.

Possible outcomes of an inquiry could be a policy or Code of Practice developed with interested parties. The knowledge gained would be applied for the benefit of employers and service providers as well as their employees and consumers. This knowledge might also be useful for the Commission in recommending legislation on human rights issues. The process itself could generate adverse publicity which might be a potent enforcement mechanism. Overall this approach would affect more people than an individual complaint.

The Act should provide protections for participants in the process. One important issue is the treatment of confidential information. For example, confidential commercial information might arise in connection with an inquiry into whether certain accommodations result in undue hardship. Certain individuals might wish to provide information, but on a confidential basis. Our recommendation that the Act provide for protection from retaliation is provided in chapter nineteen. Parts of the inquiry could be held *in camera* if necessary to protect confidentiality interests. Regulations should be made to deal with the necessary protections for these types of interests.

Recommendations:

21. We recommend that the research and information-gathering powers in the Act be modified to allow the Commission to undertake inquiries on specific issues relating to its duties and the purpose of the Act. The outcome of such an inquiry would not be a mandatory order, but rather recommendations for solving an on-going problem. The inquiry would also not determine civil or criminal liability.

22. We recommend that the Commission be given sufficient powers of enquiry to ensure that it can obtain the necessary information. We recommend that regulations dealing with matters such as confidentiality be developed to protect the interests of the participants in the process.

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CHAPTER 8
Education and Promotion of Equality

Issue

One of the most important aspects of promoting equality is the need to educate those who must provide equality and those who need equality about the meaning and intent of the Act with respect to how equality should be achieved. The Panel considered the issues of education and promotion of equality as part of our mandate.

The Act

The *Canadian Human Rights Act* requires the Commission to carry out human rights education and promotion by:

- developing public understanding of the Act and its principles;
- sponsoring research;
- maintaining liaison with provincial commissions to foster common policies;
- considering recommendations, suggestions and requests concerning human rights received from any source and to comment on them in a report to Parliament if appropriate;
- carrying out studies on human rights as referred by the Minister of Justice and reporting recommendations to Parliament;
- reviewing regulations, rules, orders, by-laws and other instruments made under another Act of Parliament and reporting to Parliament on inconsistencies with the Act;
- discouraging discriminatory acts by publicity or other appropriate means consistent with its role in processing complaints;
- making guidelines that bind itself and the Tribunal;
- initiating complaints;
- approving accessibility plans for the disabled;
- providing advice on affirmative action plans;
- reporting to Parliament annually and reporting on special matters such as inconsistencies between the Act and pension plans established by statute before the Act came into force in March 1978.

The Annual Reports of the Commission and the Tribunal both contribute to the promotion of human rights in Canada. These are, broadly speaking, educational and promotional instruments.

In its 1999 Annual Report, the Commission stated that it had to reallocate resources mainly to the protection role and expressed concern that this diverted resources away from other areas such as the education and promotion functions. Nevertheless, the Commission clearly understands the importance of human rights education and promotion and continues to be as active in this area as resources allow.

The Commission has conducted training sessions, made presentations to organizations and worked with other human rights organizations to promote human rights both nationally and internationally. Other federal departments such as Canadian Heritage also play a role in educating Canadians about human rights.

Consultations and Submissions

It is clear from the submissions that human rights education and promotion are understood by community groups, labour organizations, employers and government agencies to be essential in addressing human rights issues in Canada. Both employers and labour organizations agreed that education in the workplace is fundamental to addressing existing human rights concerns and preventing future violations.

Many submissions pointed out the proactive and preventative nature of human rights education and suggested that this function should be a priority of the Commission. There was also recognition that in order to carry out this function effectively the Commission requires adequate resources.

Here are a few examples of the submissions we received:

"[We] believe that one of the most important responsibilities of the Commission is to inform and educate the public. Public education has been another area hard hit by the drastic cutbacks to the Commission in the mid 1990s. This has severely affected the Commission's ability to carry out this important part of its role and responsibility. We know from past studies on changing attitudes that we save money in these areas with an aggressive and effective educational program." (Affiliation of Multicultural Societies & Service Agencies of British Columbia)

"We believe that the Canadian Human Rights Commission must play a leadership role and should be at the forefront in setting the standard for other approaches and jurisdictions to emulate. Public education initiatives of the Commission should clarify important concepts and constructs in human rights in Canada, and help Canadians understand the realities of the nature and extent of racism and other forms of discrimination in this country." (League for Human Rights of B'nai Brith Canada)

"Generally, education is another area in which the Commission must expand its role and for which it must be adequately funded. While the Act prohibits discrimination, it does not create positive obligations. We believe the mandatory requirement to promote human rights should be much clearer in the Act and that the educative role of the Commission '[...] to foster public recognition of the principle described in section 2' should be seen as a positive obligation on the Commission to promote sensitivity, respect and equality." (Canadian Labour Congress)

"It is the belief of Canadian Airlines that no amount of rules, regulations, policies or guidelines will have the desired effect of furthering human rights without being accompanied by a comprehensive education program. We believe that the delivery of education and guidance (in the form of best practices) should be a prime role of the Canadian Human Rights Commission." (Canadian Airlines)

The International Perspective

At the international level, there is a growing interest in the role of national human rights institutions such as the Commission in advancing the cause of human rights nationally and also internationally through assistance to other countries. This latter point is discussed later in connection with the Commission's international role. One of the Paris Principles concerning the role and functions of such institutions states that a national human rights institution "shall publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs."

The international community has acknowledged the importance of human rights education and promotion in reducing and preventing human rights violations. As a member of the United Nations General Assembly, Canada supported the 1994 proclamation that the period 1995 to 2005 be recognized as the United Nations Decade for Human Rights Education.

The Panel's Views

It has been recognized, both in Canada and internationally, that human rights education and promotion are very important elements in preventing discrimination. We are very much in agreement with this statement. It is the Panel's view that education is a much broader matter than simply providing basic learning materials and making presentations to the public. Clearly, the Commission must make sure that employers and employees, service providers and service consumers understand the purpose of the Act, its compliance requirements and the consequences of non-compliance. But more broadly, education requires many techniques to create a practical understanding of the intentions of human rights legislation in the workplace and in communities. When individuals understand their rights and the rights of others they are less likely to violate those rights.

In this Report, the Panel has been particularly concerned with the issue of systemic discrimination. We have described a number of ways that the goal of equality can be furthered within the federal sector. Human rights education and promotion is perhaps one of the most powerful tools for addressing equality issues, particularly in the area of systemic discrimination which is based on attitudes and assumptions that are held and acted on, often unknowingly. Giving people this knowledge should be the first step towards eliminating the problem.

People often accept a practice because it has always been done in a certain way. For example, they may think that equality means that everyone should be treated in the same way. When this perspective is explored from a more inclusive point of view, it can be shown that treating people the same way is based on assumptions that exclude individuals because of their personal characteristics. For example, requiring everyone to work on Saturday will exclude those whose religious beliefs forbid them to work on that day. The search for a solution may lead to the exploration of different options for a particular practice, to include those who have been excluded through various forms of accommodation. Educating the public to recognize systemic discrimination, its effect on individuals, and how to eliminate it from organizations will go a long way

towards addressing existing situations and preventing future systemic discrimination.

Education for Those Served by the Act

Education about human rights is much broader than the brochures, speeches and training sessions provided by a commission. Much of what the Commission does, including its enforcement activities, teaches individuals and organizations valuable lessons about what equality means and how to achieve it. Sometimes lessons are taught by the Commission when it releases a policy stating its view on a particular issue. Lessons are learned when an issue goes to a Tribunal. No matter the outcome, a lesson is provided by the Tribunal, (or perhaps the reviewing Court) about what the Act says about a particular issue.

The Panel heard during our consultations that everyone interested in equality issues in the federal sector needs to learn something about the Act. Individuals may need to learn in a very user-friendly way about whether some action they have experienced is contrary to the Act and perhaps how to file a claim with the Tribunal about it. Employers need information about barriers to employment to help them with issues under the Act and the *Employment Equity Act*. Unions need to know about the contribution they can make towards equality in the workplace and how to advise their members about their rights. The general public needs to know about the changing meaning of equality so that they can understand the stories they read in the newspaper. We all need to learn more about each other's needs and aspirations in order to act in a more inclusive way. The government needs to learn about the equality issues developing in society. The international community needs to learn about the development of equality in Canada.

With such a broad scope for learning and education initiatives, it is clear that education about and promotion of equality issues are among the most important of the Commission's functions.

Using New Technologies

Many commissions in Canada have sites on the Internet and have posted very useful information about themselves and human rights issues. The Canadian Human Rights Foundation held a conference on Human Rights and the Internet in 1998. There was agreement that the Internet held great possibilities for human rights education and promotion on the international level. However, we must be careful that the use of this new technology does not create a new barrier that denies access to people who do not have access to computers, whether because of poverty, a disability or other reason.

(a) A National Approach

All the commissions in Canada carry out education and promotion activities as do many different levels of government. Many of the issues they deal with are the same. For example, sexual harassment is prohibited by human rights legislation everywhere in Canada. The 1999 decisions of the Supreme Court of Canada in the *Meorin* and *Grismer* cases, setting out the new meaning of how to justify discriminatory practices, apply to the legislation in all provinces.

The Panel is of the view that it would be advantageous to have the commissions pool their talents and resources in a national approach to educating the public, employers, unions, service providers and other individuals and organizations about human rights issues. This approach could help overcome concerns about jurisdictional responsibilities in the area of education.

In its 1999 Annual Report, the Commission noted that it carries out promotional work with provincial commissions. It reports on a couple of workshops carried out with other commissions and its involvement in the Canadian Association of Statutory Human Rights Agencies (CASHRA) where commissions discuss matters of common interest.

We think that given the proper resources and with the removal of the complaint processing function that may inhibit a truly promotional role, the Commission could play a more central role in human rights education and promotion in Canada. Education and promotion could be one area where the Commission might coordinate with the provincial and territorial commissions, to work together on educational and promotional programs, including the production of educational and training materials. There would seem to be little need for the commissions to have separate brochures or training materials on the meaning of harassment, for example. Though the various commissions may differ somewhat on the specifics of their educational mandate, there are issues that many commissions have identified as concerns that could probably be addressed on a national basis, such as a national educational strategy on systemic discrimination. There are a number of ways

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that resources could be pooled to promote equality in Canada.

The federal Commission could play a central role in organizing meetings of Commissioners and officials involved with education in order to develop national educational programs. The federal, provincial and territorial governments do this regularly for many matters they share in common. Work would be required on how to fund such programs. However, we believe these matters are sufficiently important that any hurdles could be overcome cooperatively and the Panel encourages the federal government and the Canadian Human Rights Commission to take a leading role in finding solutions.

The Need for Sufficient Resources

More resources would likely be required to increase the size of the Commission's education and promotion functions. Most of the recent reviews of human rights legislation have noted the lack of resources that commissions get to carry out their educational and promotional mandate.

"A number of people said [...] that the Commission should undertake a massive educational campaign using television ads to inform people of their rights. One factor in the failure of the Commission to carry out a major educational campaign of this kind, however, is its budget. It simply never had the staff or resources to play a major educational role around the province for all the groups and issues covered by the Code." (*Achieving Equality: Report on Human Rights Reform* [Ontario])

"Over the years [...] the traditional educational role of the commission has largely been lost. The commission responds whenever possible to requests for speakers, displays, advice, training sessions and community consultation, but these activities are basically an 'add-on' to other duties." (Report of the Saskatchewan Human Rights Commission *Renewing the Vision.*)

Human Rights Education in the Federal Government

A number of federal departments and agencies carry out education and promotion of human rights issues. Canadian Heritage, Status of Women Canada and other departments and agencies have budgets for equality research and promotion. We think it would be a good idea to explore ways to coordinate the parts of these programs that share common elements. There may be economies of scale that could make these programs more efficient. The Commission might be the appropriate body to coordinate these activities recognizing that each department has it own unique responsibilities in this area.

Human Rights Education and Other Organizations

We think the Commission should be encouraged to continue to expand its work with community and other organizations in educational and promotional matters. Some funding might have to be provided to these organizations where they lack resources of their own.

Internal Responsibility System

In recommending the Internal Responsibility System, (see chapter five) we think that once these systems are in place they could serve as points of contact between the Commission and federal workplaces. The Commission could assist those involved with the Internal Responsibility System with the education, training and promotion assistance needed to realize the potential of this kind of a system as a tool for developing internal equality policy and assisting in the dispute resolution function.

Recommendations:

23. We recommend that the Act emphasize the importance of the Commission's education and promotion function and that the Commission take a more active role in this area.

24. We recommend that the Commission be given sufficient resources to undertake effective human rights education and promotion initiatives.

25. We recommend that the Commission work towards greater coordination of educational activities between itself and federal government departments, provincial human rights agencies, and organizations interested in human rights issues.

(b) The Commission's International Activities

The Commission carries out a number of activities at the international level.

Canada was one of the founding countries in the Network of National Institutions for the Protection and Promotion of Human Rights. A number of countries, including Canada, ratified the Paris Principles in 1992, which set out principles for the role, composition, status and functions of national human rights institutions. This has resulted in increased attention to developing and building up national human rights institutions around the world.

Members of the Commission and officials attend various international conferences concerning human rights around the world, receive foreign delegations and interns and maintain relationships with other human rights organizations.

The Commission enters into agreements with the Canadian International Development Agency (CIDA) to carry out a number of human rights projects, usually by working with human rights commissions in other countries. The Commission's role is to provide advice and practical assistance to these commissions. Support was provided, for example, to Mexico, Cameroon, Cuba, South Africa and Indonesia. These projects are usually the result of a ministerial or departmental request.

The Auditor General expressed some concern about the authority of the Commission to enter into these agreements with CIDA and the Commission's management controls.

The Commission wants to have its participation in international initiatives authorized by the Act. Submissions by CIDA support the Commission's international role.

It is the Panel's view that the international role of the Commission is important and furthers Canada's efforts to promote human rights for all people of the world. However, the Commission's primary focus must be to carry out its domestic roles. We would not want to see the Commission diverted from the tasks that result from our recommendations by a large expenditure of resources internationally. Any resources that are required by ministerial or departmental request for international activities should not come from the Commission's budget or staff.

We believe that the Commission's international activities should be regularized in the Act.

Recommendations:

26. We recommend that the Commission should be authorized by the Act to enter into agreements to carry out support work with human rights institutions outside Canada in keeping with its status as a national human rights Commission.

27. We recommend that the funding of such agreements and the resources (budget and staff) be provided by the Canadian agency or department that wishes the Commission to carry out these projects rather than from the Commission's own resources.

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The federal Commission could play a central role in organizing meetings of Commissioners and officials involved with education in order to develop national educational programs. The federal, provincial and territorial governments do this regularly for many matters they share in common. Work would be required on how to fund such programs. However, we believe these matters are sufficiently important that any hurdles could be overcome cooperatively and the Panel encourages the federal government and the Canadian Human Rights Commission to take a leading role in finding solutions.

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A number of federal departments and agencies carry out education and promotion of human rights issues. Canadian Heritage, Status of Women Canada and other departments and agencies have budgets for equality research and promotion. We think it would be a good idea to explore ways to coordinate the parts of these programs that share common elements. There may be economies of scale that could make these programs more efficient. The Commission might be the appropriate body to coordinate these activities recognizing that each department has it own unique responsibilities in this area.

Human Rights Education and Other Organizations

We think the Commission should be encouraged to continue to expand its work with community and other organizations in educational and promotional matters. Some funding might have to be provided to these organizations where they lack resources of their own.

Internal Responsibility System

In recommending the Internal Responsibility System, (see chapter five) we think that once these systems are in place they could serve as points of contact between the Commission and federal workplaces. The Commission could assist those involved with the Internal Responsibility System with the education, training and promotion assistance needed to realize the potential of this kind of a system as a tool for developing internal equality policy and assisting in the dispute resolution function.

Recommendations:

23. We recommend that the Act emphasize the importance of the Commission's education and promotion function and that the Commission take a more active role in this area.

24. We recommend that the Commission be given sufficient resources to undertake effective human rights education and promotion initiatives.

25. We recommend that the Commission work towards greater coordination of educational activities between itself and federal government departments, provincial human rights agencies, and organizations interested in human rights issues.

(b) The Commission's International Activities

The Commission carries out a number of activities at the international level.

Canada was one of the founding countries in the Network of National Institutions for the Protection and Promotion of Human Rights. A number of countries, including Canada, ratified the Paris Principles in 1992, which set out principles for the role, composition, status and functions of national human rights institutions. This has resulted in increased attention to developing and building up national human rights institutions around the world.

Members of the Commission and officials attend various international conferences concerning human rights around the world, receive foreign delegations and interns and maintain relationships with other human rights organizations.

The Commission enters into agreements with the Canadian International Development Agency (CIDA) to carry out a number of human rights projects, usually by working with human rights commissions in other countries. The Commission's role is to provide advice and practical assistance to these commissions. Support was provided, for example, to Mexico, Cameroon, Cuba, South Africa and Indonesia. These projects are usually the result of a ministerial or departmental request.

The Auditor General expressed some concern about the authority of the Commission to enter into these agreements with CIDA and the Commission's management controls.

The Commission wants to have its participation in international initiatives authorized by the Act. Submissions by CIDA support the Commission's international role.

It is the Panel's view that the international role of the Commission is important and furthers Canada's efforts to promote human rights for all people of the world. However, the Commission's primary focus must be to carry out its domestic roles. We would not want to see the Commission diverted from the tasks that result from our recommendations by a large expenditure of resources internationally. Any resources that are required by ministerial or departmental request for international activities should not come from the Commission's budget or staff.

We believe that the Commission's international activities should be regularized in the Act.

Recommendations:

26. We recommend that the Commission should be authorized by the Act to enter into agreements to carry out support work with human rights institutions outside Canada in keeping with its status as a national human rights Commission.

27. We recommend that the funding of such agreements and the resources (budget and staff) be provided by the Canadian agency or department that wishes the Commission to carry out these projects rather than from the Commission's own resources.

CHAPTER 9
Reform of the Complaint Process

Some Assumptions Underlying the Current System

When the Act was passed in 1977, most people thought of discrimination in terms of what we now call direct discrimination, though there may also have been an understanding that discrimination on the ground of "physical handicap" could arise from inaccessible facilities and workplaces.

The government of the day likely assumed that most cases would be settled and that adjudication would be a matter of last resort. The Commission would thus have been contemplated as an organization for resolving disputes probably of a fairly limited scope. The Commission's role in dismissing cases would probably not have been seen as significant as it has become today.

Since 1977, the concept of discrimination has developed largely through the cases that have been taken before the tribunals and courts. Complaints run the gamut from racial epithets to complex cases of systemic discrimination involving the consideration of fundamental assumptions about the structure and organization of the workplace.

The remedies for discrimination have become more powerful. Commissions are concentrating more and more resources on the complaints they must process. Since the Act was passed, the courts have recognized human rights issues to be almost constitutional in nature. This heightens the importance of the process used for determining whether there has been a breach of the Act.

Accommodating Public Interest and Private Justice

The current complaints process addresses **public interest** by ensuring that certain activities are investigated, subject to a decision-making process to determine which cases should be conciliated or adjudicated at public expense as breaches of the public policy against discrimination. The investigation process assists the Commission in determining whether the case should be screened in or out. In this sense, it is like the criminal process which investigates and prosecutes crimes at public expense because crimes are breaches of public policy.

The complaints process also aims at **private justice** by providing compensation to the victim, unlike the regular criminal process where no compensation is provided to the victim except through special victim compensation programs.

Claims for direct access to the Tribunal or the courts seem to be based on the idea that the courts have ruled that each case is a breach of a quasi-constitutional right and therefore is deserving of adjudication as a matter of public justice. At the same time, claimants seek a remedy in their own particular cases as a matter of private justice. Consequently, advocates of a direct access approach see a screening function aimed at prioritizing complaints for their public utility as infringing on the public justice value of each and every complaint and at the same time preventing individuals from attaining private justice, which in most cases is extremely valuable.

The Findings of the Auditor General

The Auditor General spent one and a half years auditing the Commission's processes. The Final Report which came out in September 1998 concentrated on the existing individual complaints system and concluded that "...the approach that has evolved is cumbersome, time-consuming and expensive."

Important findings in the Report were:

- of the approximately 6550 complaints decided between 1988 and 1998, 67% were dismissed or not dealt with and 6% were sent to Tribunal;
- the Commission took about two years on average to make a decision on a complaint (excluding equal pay complaints);
- many of the time delays were within the Commission's control, though others resulted from the inability of the Commission to enforce deadlines, such as for the respondent's responses to the complaint;
- in 1997, almost one-half of the Commission's caseload was considered to be in "backlog" (where the investigation was going on more than nine months after the complaint was signed) and about the same number of cases were still under investigation one year after the complaint was signed;
- between 1991 and 1995, the backlog ranged from 62% to 72% of the total number of complaints;

- several times since 1989, the Commission received extra funds from Treasury Board to reduce the backlog;
- at the time of the Auditor General's Report, the Commission was going to have to make yet another request for extra funding for this purpose;
- the Tribunal took an average of one year to dispose of a complaint;
- the decisions themselves took about five months after hearings were finished;
- complaints that were sent to conciliation after investigation took 45 months before the Commission's final decision;
- the Commission's operating environment had become more difficult: grounds had been added to the Act; the concept of discrimination had become more complex; parties were becoming more litigious; the Commission and Tribunal budgets were reduced; the number of investigators were reduced; there was a high turnover of investigators so that files were often reassigned; the roles of the Commission to promote and advocate human rights and to investigate complaints impartially may have been in conflict;
- stakeholders told the Auditor General they were concerned about a conflict of interest; the investigations were too cursory; the delays were unfair; the Commission dismissed cases without reasons;
- the Commission did not use its power to initiate complaints because it had been challenged by respondents, when it had previously attempted to initiate complaints on the basis of an apprehension of bias and that third parties usually file complaints;
- the Auditor General estimated that since 1996, 18% of cases were settled, 11% in early resolution or in investigation and 7% in conciliation after investigation, adding an average of 11 months to the time for the investigation resulting in a 45 month period for the processing of complaints;
- mediation would improve conciliation goals and efficiency based on the Ontario model (voluntary, neutral though with power to reject settlements not in the public interest, with well-trained mediators).

The recommendations of the Auditor General related only to the complaints process. They included:

- allow more choice for complainants and respondents to resolve complaints, perhaps with a direct access to the Tribunal or courts;
- separate advocacy and impartial investigation and conciliation roles;
- create time limits for the receipt and disclosure of information to and by the Commission;
- consider voluntary, neutral mediation, early in the process;
- ensure legislative authority for mediation policies and procedures.

The Commission responded in its section of the Auditor General's Report as follows: "The Commission recognizes that the time taken to deal with complaints is unsatisfactory. This is a problem faced by all human rights commissions."

The 1999 Annual Report reveals that about half of the Commission's budget is directed to the complaint process which is largely driven by individual complaints the Commission must investigate. There is no guarantee that the complaints the Commission receives represent the major issues of discrimination within the mandate of the Act. About one quarter of the budget goes towards promotion of human rights. The remainder goes towards employment equity audits and corporate services.

Consultations and Submissions

In addition to the problems raised by the Auditor General about the individual complaints process, which are similar to those faced by all commissions using this model, we heard that employers, unions, human rights groups, other non-governmental organizations and members of the public were not satisfied with the complaint system. In particular, complainants were unhappy with their lack of control. Here is a sample of these submissions focussing on institutional bias, delays, and direct access.

1. Institutional Bias

- **"The CHRC staff lack a clear mandate. At various times they are investigators, conciliators, mediators, educators, advocates, and advisors to the Commission. Often they will wear many of these hats on any one day. It is only natural, therefore, that individuals with these conflicting mandates find themselves in positions of conflict of interest."** (Federally Regulated Employers — Transportation and Communications (FETCO))
- **"Trying to be all things to all people results in pleasing no one: claimants may feel betrayed because they believed the Commission was a**

human rights advocate and not, as it turns out, the "judge" of their cause, and respondents may question the neutrality of the Commission, whose investigators and conciliators must then make a particular effort to appear impartial." (Action travail des femmes, La Table féministe de concertation provinciale de l'Ontario, National Association of Women and the Law)

- **"The anger you hear is just a fraction of the frustration and resentment that is boiling over out there. If human rights law is meant to help facilitate diverse societies living together, this one is such an abject failure it's actually contributing to the problem."** (Coalition for the Reform of the Ontario Human Rights Commission)

II. Delays

- **"Delay is the single-most debilitating feature of the human rights process. It's debilitating not only because of the emotional and personal impacts that it has, but it's debilitating because it skews the results."** (The Minority Advocacy and Rights Council)
- **"The major concern is the process itself. The complaint process is a barrier in itself to people with disabilities. People don't have the energy, the stamina, the money, the resources to be able to launch complaints. Some people actually pass away before the decision is made."** (Canadian Association of Independent Living Centers)
- **"People need to know what the process is [...] The delay is a huge factor here, and I think that's another reason why people feel that their complaints aren't attended to or given weight or ignored, because it simply takes ages to get anywhere with the human rights process."** (Dalhousie Legal Aid Services)
- **"Procedures need to be streamlined and expedited. Employers are forced to respond to complaints accepted several years after the event without any explanation of why such cases have been accepted even where there is extreme prejudice to the respondent. Witnesses and company officers have moved, are no longer with the company, or have died. Policies and practices have changed in the interim and yet the CHRC still accepts and investigates the complaint. As a result, [...] the process becomes unfair to both the individual and the respondent."** (FETCO)
- **"Presently, the time it takes to process, settle or decide a complaint of discrimination is one of the most important factors that contribute to the public's loss of confidence in the Commission."** (Action travail des femmes, La Table féministe de concertation provinciale de l'Ontario, National Association of Women and the Law)
- **"Every individual is called upon to fight the battle over and over again."** (B'nai Brith Canada)

III. Direct Access

- **"Many cases are thrown out by the Commission. For me there is a serious concern because if we are committed to addressing the issue of human rights, we must address human rights [...] in the broadest sense of the mandate. That would mean bringing issues before a body that in fact looks at it seriously, a body of experts. For us, I think one of the things we talked about was introducing something like a standing Tribunal where these cases go forward before a standing Tribunal."** (Saskatchewan Action Committee — Status of Women)
- **"CCPI urges that the screening function of the Human Rights Commission be removed from the Act and that claimants have access to the Tribunal and to effective legal representation. We believe that any dismissal of a complaint for being outside the jurisdiction of the Tribunal or trivial and vexatious can be dealt with by way of a preliminary proceeding, either an oral hearing before the Tribunal or through written submissions."** (Charter Committee on Poverty Issues)
- **"Enhancing the capacity of groups to intervene in the Tribunal process would better enable individual complaints to be placed in their broader social context and thereby redress some of the systemic issues."** (Equality for Gays and Lesbians Everywhere)
- **"We believe that the human rights Commission should enhance a systemic and regulatory effort without supplanting the complaint process completely. We believe that the human rights system should establish priority areas, should only take on cases that it can handle properly and without delay and claimants should be allowed to pursue their claims privately before the Tribunal."** (Council of Canadians with Disabilities)
- **"The Commission can no longer be the determiner of whether or not something finally gets in front of**

a Tribunal. The judicial review process is the only thing available, in the form of recourse if a complaint is dismissed. At this point, the (screening function (is so much a sort of rubber stamp for Commission decisions that the Commission essentially is the final arbiter and I think there is too much distress now with that for it to feel like a satisfactory process for people." (The National Association of Women and the Law)

- **"The system will bog down if you don't have effective representation. Make it a fundamental aspect of reform to insure that people have effective representation."** (Centre for Equality Rights in Accommodation)
- **"[There is a need] to ensure that the complainants get independent legal advice or get some kind of advocacy, independent advocate to work on their behalf. The process needs to become much more open and much more transparent so that unrepresented people feel that they have some control over what's happening."** (Dalhousie Legal Aid Services)
- **"One of the challenges in dealing [...] with the Commission under the current structure is that it isn't a user-friendly model which puts people under a tremendous amount of stress and at a real disadvantage. This is a critical area that needs to be addressed. An individual having support people and having advocates with them is critical and important and it's been one of the real challenges for those of us who work in the area of human rights."** (Affiliation of Multicultural Societies and Service Agencies of B.C.)
- **"It is feared that a larger number of complaints might end up before a Tribunal therefore adding to the workload of the Tribunal."** (Treasury Board of Canada)
- **"If every complaint had the right to a hearing at government expense, the Tribunal would quickly become backlogged and the cost could escalate. Tribunal hearings should occur only if the Commission is satisfied that there is merit to the complaint."** (The Canadian Bankers Association)
- **"The current model of the Commission as a "gatekeeper" of complaints should be eliminated. Victims of discrimination should be able to pursue their complaints even if the Commission does not want to be involved. We suggest a model for individual complaints which gives less of a role to the Commission as an investigative body and more to the Tribunal as an adjudicative body. The Commission should be the first point of contact for a complainant, and the Commission should make a quick determination as to whether it wants to be involved."** (The Canadian Bar Association)
- **"The existing Commission style model does not reflect this fundamental distinction between public and individual interests. By forcing all individual complainants to pass through the gatekeeper, there is no opportunity to directly present evidence to a decision-maker with the power to issue an enforceable order. This model creates a system that is paternalistic, disempowering and ultimately discriminatory because the only people in Canada who are forced to go through the system are the ones who are already identified as disadvantaged."** (Coalition for the Reform of the OHRC)

The Canadian Human Rights Commission in its Annual Report, 1999 supports the views of the various submissions we heard. They wrote:

- **"[The existing complaints process] has become too lengthy and complex, far from the simple model envisaged by the legislators a generation ago. There is a need to simplify procedures and introduce a level of flexibility that would permit the Commission to differentiate between cases presenting issues of substantive discrimination and those that are clearly matters of poor labour relations or a manifestation of a breakdown in communications between the parties."**

International Requirements for the Human Rights Process

Canada has been advised by two United Nations human rights bodies that human rights protections require direct access to the Tribunal.

In November, 1998, at the third periodic review of Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights*, the United Nations Committee on Economic, Social and Cultural Rights stated:

"[...] enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups."

The United Nations Human Rights Committee also noted in its concluding observations about Canada's

compliance with the requirement of the *International Covenant on Civil and Political Rights* that states provide an "effective remedy" for human rights violations:

"The Committee is concerned with the inadequacy of remedies for violations of articles 2, 3 and 26 of the Covenant. The Committee recommends that the relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination."

The Panel's Views

It is the Panel's view that there will continue to be a need for a dispute resolution process where individuals and organizations who disagree with employers or service providers about whether they have received equal treatment can take contentious issues to be resolved.

The dispute resolution process must resolve a number of problems faced by the current process. The five most serious issues are: delays; perceived conflict of roles; perception that meritorious complaints are dismissed; inability to focus resources; and the importance of tribunal interpretation.

Delays

Delays in the process reduce the likelihood of achieving the goals of the Act expeditiously and lower the credibility of the process with the non-governmental organizations.

On January 24, 2000, the Supreme Court of Canada heard the appeal in the case of *Blencoe v. British Columbia Human Rights Commission*, in which the British Columbia Court of Appeal prohibited a sexual harassment complaint from being heard by a Board of Inquiry. The argument that was accepted by the Court of Appeal was that the alleged harasser had suffered so much social stigma during a delay of over 30 months from the date of the complaint to a hearing, that his security of the person was infringed, contrary to section 7 of the Charter. Whether or not the Supreme Court of Canada upholds the decision in that particular case, we think that steps should be taken to reduce or eliminate delays. As we noted earlier, the Auditor General found that the Commission took two years on average to process a complaint and that since 1996, complaints that were sent to conciliation after investigation took 45 months before receiving the Commission's final decision.

There has been a concern raised with the effect of delays on the rights of the respondent to raise a full and fair defence. The Panel is equally concerned about the effect a delay may have on a victim being able to be placed back in the position he or she would have been in but for the discrimination. Delays have a negative effect on both complainants and respondents.

In its 1999 Annual Report, the Commission notes that the existing complaints process "has become too lengthy and complex." It is clear to us that the delay in the complaint process is a very serious problem, one that the Commission has tried valiantly to solve, but without much success.

The Perceived Conflict of Promotional and Investigation/Decision-making Roles

The many and sometimes conflicting roles of the Commission is a central problem with the current model. The conflict creates litigation about bias, setting aside Commission decisions. It also reduces the credibility of the enforcement process, because respondents see the Commission as favouring the complainant, and complainants often have the impression that the Commission supports respondents. The perceived conflict also inhibits some functions such as the provision of guidance and advice to those who must comply with the Act because the Commission must be neutral in the complaints process since it may be called upon to judge whether its advice was correct in deciding whether to dismiss a complaint or send it to Tribunal.

Making guidelines is also inhibited because the Commission has a function to appear before the Tribunal to present evidence and to make representations about a complaint, and it has a role to make the guidelines that will bind the decision-maker to a certain interpretation of the Act. The Commission may recoil from initiating complaints because it must process complaints impartially. Conflicting functions cause tension in the education process too because employers complain that the Commission sometimes appears to be too much of an advocate.

If these conflicts remain unresolved, it will be difficult for the government to justify giving the Commission greater rule-making powers, since the Commission, a federal government agency, would have control over human rights issues in the federal sector where the federal government itself is often the respondent.

Perception that the Commission is Dismissing Too Many Meritorious Complaints because of Lack of Resources

A third central issue is the desire for direct access to the Tribunal, without the Commission dismissing complaints that are not settled. This, in part, stems from a concern, particularly from non-governmental organizations including unions, that the Commission is dismissing or refusing to deal with too many cases. They feel that there is pressure on the Commission to make do with a low level of resources, forcing it to dismiss cases for administrative reasons. There is also a recognition of the growing remedial power of the Tribunal and the realization that not only does the system serve a public interest role by reducing discrimination, but it can also provide private justice in the form of full compensation. Lack of access to the Tribunal reduces individual opportunity for private justice and consequently the credibility of the process with human rights groups and other non-governmental organizations.

Inability of the Commission to Focus its Resources on the Most Serious Human Rights Issues

The Commission is now bound by the Act to deal with complaints that may not represent the most pressing issues of discrimination and may not lead to changes that will benefit large numbers of people. We think it is important to ensure that the Commission can focus its resources where they can do the most good. The result of the current process is that the Act does not fully achieve the public objective we described earlier. However, changes should not be made at the expense of individuals who want a resolution to their own cases.

Importance of Tribunal Interpretation

The Tribunal system must be maintained because it is an expert administrative body that can resolve equality disputes and generate decisions that inform people about compliance with the Act. The Act gives the right to an individual to seek a remedy, but also places a government agency between the individual and access to the Tribunal process to have the dispute resolved on its merits.

Options for Structural Change to the Dispute Resolution System

The Panel found in developing options for a dispute resolution system that the questions of conflict of roles and the issue of the screening function — one of these roles — are too closely related to deal with separately. The question of delay is also closely connected to the roles of the Commission as the Auditor General's Report shows that many of the delays are internal to the complaints processing role itself. In seeking solutions to these problems, the Panel examined three options.

Option 1 — A Commission with Clear, Statutory Separation of Functions

The conflict or potential conflict between the active roles of advocate/complaint initiator/educator/advisor/approver and the process and control roles of investigator/mediator/adjudicator/prosecutor have created many problems. The Panel considered an option that would keep the Commission intact, but create a clear, statutory separation between these functions.

Each major function would be presided over by a Commissioner who would carry out these functions on a full-time basis. The Act would provide that the Commissioners would carry out their functions independently and have no control over each other's operations. For example, one Commissioner would be in charge of complaints processing from intake to referral to Tribunal.

There could be a second Commissioner who would direct and manage the proactive role. This Commissioner would carry out research on patterns of discrimination to establish the Commission's priorities and then possibly initiate complaints or inquiries and instruct Commission counsel appearing before the Tribunal.

A third Commissioner would be in charge of education and policy-making. This would include the Commission's rule-making powers, whether these are simply policy statements or rules that have some force of law (the current guidelines bind only the Commission and the Tribunal), and inquiry functions.

This model would address delays in several ways. First it would ensure early "triage" of complaints — that is, complaints would be examined by experienced human rights officers or the Compliance Commissioner to determine how they should be handled. The "triage" official would consider:

- whether the complaint was amenable for mediation;
- whether it should be dealt with according to the process for multiple proceedings;
- whether the case was beyond the jurisdiction of the Act;
- whether it was filed too late;

- whether a full-scale investigation was needed;
- whether the case should go directly to Tribunal because an investigation would not add to the case.

The Commissioner, who would carry out this function on a full-time basis, would deal with the cases as soon as they were ready. However, there is no guarantee that this option would reduce delays or improve transparency between the Commission and complainants.

A second way of dealing with the delay would be to make some changes to the current investigation process. Statutory or regulatory time limits could be established to limit the length of time for each step in the process. This raises an important question of what happens when there is non-compliance with the time limits. A complaint could be dismissed because a complainant failed to provide evidence. However, sending a case to Tribunal without evidence because the respondent had not replied to a request for material would likely result in a waste of the Tribunal's time. The Tribunal itself could be given substantial power to compel information.

A variant would be to have complainants provide their evidence in written form directly to the Commission. Complainants and respondents could be given sufficient guidance to know what material to submit. The evidence and submissions would then be given to the complainant and the respondent for their comments. As a consequence, all the material could be presented to the Commission. However, there would exist the problem that the Commission would lack the assistance of the investigator to organize the evidence. This approach would also fail to meet the needs of many complainants or potential complainants who are simply unable to gather the required evidence.

A third way to reduce delay would be to make greater use of ADR to resolve cases early in the process.

The concern of human rights groups that complaints are being dismissed too easily and for solely administrative reasons could be dealt with by narrowing the grounds for dismissal. The Commissioner could be empowered to dismiss cases:

- for lack of jurisdiction;
- where a proper disposition of the discrimination issue was made in another process;
- where there is a complete lack of evidence to support the claim;
- where the complaint was made in bad faith; or
- where the complaint was filed too late.

All other cases would be referred to the Tribunal.

Option 2 — Allow Direct Access to the Tribunal to Complainants Screened out by the Commission

The Panel considered the option of providing a right to complainants, whose complaints were dismissed by the Commission, to take their cases to the Tribunal. The complainant would need access to the Commission file and legal assistance. The appearance of conflict of interest, delay in investigating and determining complaints, the disempowering effect of the Commission monopoly on complaints, and the inability of the Commission to target its resources to the most serious equality problems, would require a new model of dispute resolution.

In addition to many of the advantages of the first option, this one would give complainants whose complaints had been dismissed by the Commission the right to take their case to the Tribunal.

Option 3 — Direct Access to the Tribunal or Court

It is the Panel's view that the most serious problems we have identified will remain with the models that do not separate a proactive Commission from the complaint processing function and that permit the Commission to dismiss complaints without a hearing.

A third option would empower a claimant to take a human rights claim directly to Tribunal, ending the Commission's monopoly on complaint processing. Claims would be filed directly with the Tribunal. This process would have a pre-hearing process to ensure that cases without merit would not proceed to a full hearing before the Tribunal. The Tribunal would ensure through its rules and orders that the parties to the case were fully informed of the issues and the evidence of the other side before proceeding to a full hearing. Legal assistance would be provided to ensure that claimants and impecunious respondents had the help needed to present their case. The details of this option are discussed in the next chapter.

The Panel's View

It is the Panel's conclusion that Option 3 has the greatest potential to correct the problems arising from the process now used. This option incorporates almost all the advantages of Options 1 and 2 and has unique advantages of its own.

The advantages of this option are that there would be no institutional conflicts between the Commission's role as decision-maker and advocate. This would

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increase the credibility of the Commission as an advocate for human rights, making the other proactive activities of the Commission more persuasive. The delay at the Commission stage would be eliminated. The parties would be accountable for their own delays and the Tribunal would have more powerful tools to ensure that the parties proceeded as quickly as possible.

The Commission would be able to use its resources more effectively taking the most significant human rights cases to Tribunal to achieve the greatest good for the greatest number. The Commission would have greater control over its resources than in the current individual complaints model, allowing it to act in a proactive way to promote human rights. The Commission would also be free from some of the inhibitions created by its previous institutional conflicts. The direct access model would allow the Commission to become more transparent about its enforcement goals, emanating from the criteria it would use for selecting cases to initiate or join as a party. The Commission would be able to target problem employers and service providers and the worst human rights violations, something it could not do while bound by a process to address all complaints as though they were equally beneficial to the public interest. Even though it is possible that the Commission may have been able to do some of this under the existing Act, the new system we are proposing will make it easier and clearer to focus resources on problem areas.

This option would also give claimants greater control over their disputes with employers and service providers.

It is the Panel's view that the most serious problem we have identified will remain if Options 1 or 2 are adopted because these options do not separate a proactive Commission from the complaint processing function. Option 1 moves in the direction of a separation of functions, since functions are divided between Commissioners. However, the fact is that a single agency — the Commission — would remain responsible for all the functions. Also the division of functions between Commissioners may result in a lack of cohesiveness, or even to conflicts between Commissioners. Option 2 provides a right of direct access, but only after the entire existing investigation and screening process has been completed by the Commission. Therefore, this option would do little if anything to reduce delays and would require additional resources for the Tribunal without resulting in any reduction in the resources required by the Commission.

The only significant disadvantage of Option 3 is that it would require more resources both for legal representation and for the Tribunal because of the increase in caseload. However, some resources will be freed up by reducing the complaints process function of the Commission, though the Commission will need to retain some resources for pursuing systemic cases. In the Panel's view, the net increase in resources that would be required is within acceptable limits. We think the additional resources are money well-spent because they will provide more effective human rights protection and at the same time avoid the costs, uncertainty and frustration to complainants and respondents caused by the delays in the present system.

Recommendations:

28. We recommend that the Act provide a process that allows claimants the right to bring their cases directly to the Tribunal themselves with public legal assistance.

29. We recommend that the Commission be empowered to join in the cases that are the most significant human rights cases that will provide the greatest equality impact.

increase the credibility of the Commission as an advocate for human rights, making the other proactive activities of the Commission more persuasive. The delay at the Commission stage would be eliminated. The parties would be accountable for their own delays and the Tribunal would have more powerful tools to ensure that the parties proceeded as quickly as possible.

The Commission would be able to use its resources more effectively taking the most significant human rights cases to Tribunal to achieve the greatest good for the greatest number. The Commission would have greater control over its resources than in the current individual complaints model, allowing it to act in a proactive way to promote human rights. The Commission would also be free from some of the inhibitions created by its previous institutional conflicts. The direct access model would allow the Commission to become more transparent about its enforcement goals, emanating from the criteria it would use for selecting cases to initiate or join as a party. The Commission would be able to target problem employers and service providers and the worst human rights violations, something it could not do while bound by a process to address all complaints as though they were equally beneficial to the public interest. Even though it is possible that the Commission may have been able to do some of this under the existing Act, the new system we are proposing will make it easier and clearer to focus resources on problem areas.

This option would also give claimants greater control over their disputes with employers and service providers.

It is the Panel's view that the most serious problem we have identified will remain if Options 1 or 2 are adopted because these options do not separate a proactive Commission from the complaint processing function. Option 1 moves in the direction of a separation of functions, since functions are divided between Commissioners. However, the fact is that a single agency — the Commission — would remain responsible for all the functions. Also the division of functions between Commissioners may result in a lack of cohesiveness, or even to conflicts between Commissioners. Option 2 provides a right of direct access, but only after the entire existing investigation and screening process has been completed by the Commission. Therefore, this option would do little if anything to reduce delays and would require additional resources for the Tribunal without resulting in any reduction in the resources required by the Commission.

The only significant disadvantage of Option 3 is that it would require more resources both for legal representation and for the Tribunal because of the increase in caseload. However, some resources will be freed up by reducing the complaints process function of the Commission, though the Commission will need to retain some resources for pursuing systemic cases. In the Panel's view, the net increase in resources that would be required is within acceptable limits. We think the additional resources are money well-spent because they will provide more effective human rights protection and at the same time avoid the costs, uncertainty and frustration to complainants and respondents caused by the delays in the present system.

Recommendations:

28. We recommend that the Act provide a process that allows claimants the right to bring their cases directly to the Tribunal themselves with public legal assistance.

29. We recommend that the Commission be empowered to join in the cases that are the most significant human rights cases that will provide the greatest equality impact.

CHAPTER 10
The New Direct Access Claim Model

Issue

As outlined earlier, the Panel believes that direct access to the Tribunal is the preferred approach to resolving disputes. This chapter will elaborate the dispute settlement process that we propose.

Terminology

- Under the new process we will refer to all actions filed with the Tribunal as "claims." The term "complaint" will be used only when we are referring to the current actions filed with the Commission. We feel that the term "claim" is a more familiar term in proceedings which will become more analogous to court proceedings. Also, the term "complainant" will be replaced by the term "claimant" as complainant appears to minimize the importance of the person undertaking the proceedings.
- For the sake of clarity we will call the person responding to a claim the "respondent" and their response the "reply."
- "Rules" mean Tribunal Rules of Procedure established by law.

(a) The Proposed Model

In the Panel's view, the dispute resolution process should remain an important tool for the Commission and claimants to use in carrying out the intent of the Act. An individual or organization should be able to file a claim directly with the Tribunal and expect a decision from the Tribunal on the claim. What we are proposing is that the Commission no longer be in charge of deciding whether claimants should be able to present their cases for decision by the Tribunal.

We realize this will make the process somewhat more complicated than simply approaching the Commission with a complaint and it will be necessary to ensure that individuals and organizations have adequate information about the system, how to use it and what to expect from it. They will also need assistance in developing and presenting their cases to the Tribunal. We are recommending the establishment of a Legal Clinic to assist with legal representation. The Commission would still be a primary contact for individuals who want to know if they have a case and who want assistance in putting together their claims. However, the Tribunal, and not the Commission, would become the focus of the claims resolution process. The Commission would no longer have a monopoly on the processing of disputes about whether the Act has been breached.

Although the public traditionally sees the complaints process as the central role of human rights commissions, we think that the claims process should be seen as only one of the tools required to promote equality. Our Panel is recommending a move from an Act that is based on prohibiting certain discriminatory acts, to a system that is meant to positively promote equality, which will, of course, include the prohibition of discriminatory practices, but which is actually aimed at the broader positive purpose. We are recommending a new orientation for the Commission, one that will integrate the use of the various new tools we recommend, rather than one that finds many of its resources consumed processing individual complaints which may vary greatly in their impact on the ultimate goal of advancing equality.

We anticipate that employers or service providers will be able to obtain information about how to comply with the Act from the policies, guidelines, Codes of Practice and other promotional activities that we expect the Commission would put at the forefront of its activities. We think compliance with the Act begins with informing individuals and organizations about their rights and duties. The claims resolution process would be supplemented by the internal responsibility system in the workplace that we recommend. However, the Tribunal process will remain an important part of the compliance process.

Another benefit of the direct access system would be the added incentive for the parties to resolve their differences early to avoid the trouble and expense of going to Tribunal. Under the new system, respondents would not have the option of being able to wait to see if their claim was one of the small percentage of cases referred to the Tribunal after investigation and conciliation by the Commission before taking it seriously. Alternate dispute resolution would be an important part of the process.

We have prepared a flow chart of the proposed process as Annex D of the Report.

(b) Step 1 — Initial Inquiries from the Public

The 1999 Annual Report states that the Commission receives about 50,000 inquiries from the public each year, of which many are not human rights matters. The Commission attempts to refer claims outside its jurisdiction to the appropriate agency. Commission officials also give advice to callers about jurisdictional matters, allegations of discrimination and will provide assistance with drafting complaints.

In its new role in the direct access process in the future, the Tribunal would have to handle some of these calls. It would not be the secondary institution in the process since it would no longer be simply responding to complaints referred by the Commission. Under the new process, the Tribunal would be the place that individuals and organizations would be able to take their disputes. The Tribunal would get calls about its process and other matters, just as court offices do.

However, it would not be appropriate, in the Panel's view, for the Tribunal to provide advice to individuals about jurisdictional issues, completing claim forms or other such matters when the Tribunal might later be called on to decide these very issues in a judicial capacity. A greater separation between the initial inquiries from the public and the decision function would build integrity into and support for the new system.

We think the Commission should continue to deal with initial public inquiries. Commission officials have developed the expertise to provide this service and they should continue to do so. The Commission would no longer need to meet the requirements of an impartial decision-maker since it would no longer investigate or dismiss or refer complaints. There would be no pressure for officials to advise against filing a claim for fear of adding to a mounting backlog. Further, if the potential claimants did not like the advice provided, they would still be free to pursue a claim regardless of the Commission's viewpoint.

The Commission would need officials to handle inquiries, up to and including the drafting of claim forms. The Commission's regional offices would continue to take calls and provide basic advice on such matters as jurisdictional issues or questions about discrimination. They would assist individuals in filling out claim forms and advising about the kinds of documents needed for the claims process. This would supplement the standard type of information about the claims process that the Commission and the Tribunal should make available to all potential users of the system. We will return to the question of the role of providing assistance in the claims process in chapter eleven.

Of the approximately 50,000 calls received in 1998–1999, the Commission estimates that it opened about 1700 files. Many of these potential complainants, for they may not yet have filed formal complaints, would be referred to other appropriate processes to resolve their problems. In some cases, disputes would be settled at this early stage without resorting to the formal process.

In fiscal year 1998–1999, the Commission estimated that about 640 complaint forms were signed. This does not provide a complete picture of the number of actions that would actually be dealt with by the Tribunal. For technical reasons, the Commission may take two or three complaints based on the same fact, situation or policy. For example, an individual might file three complaints about one employment issue, one alleging the actual discrimination suffered, another claiming the employer's policy to be discriminatory, and a third where the employer's policy is governed by a policy established by a third party. In sexual harassment cases, a complaint might be taken against the employer as well as the alleged harasser. Further, separate complaints may be filed by different people based on similar allegations of discrimination against the same employer or service provider. This group of complaints may proceed at the same time.

We would not expect a huge increase in the actual number of formal claims in the new system. All formal claims would be dealt with by the Tribunal and, as indicated earlier, the Commission would continue to assist individuals in filing their claims.

There is a relationship between the initial inquiries function and the promotion function of the Commission. As the Commission informs people of their rights and what to expect in an environment that respects the equality of individuals, the number of inquiries about the process would likely increase.

We have already considered the utility of the internal responsibility system in assisting employees with questions about rights and duties. Nevertheless, the Commission and its officials would still have to provide information and advice to the public. The Commission should ensure that these early information services are provided more proactively to individuals who are less likely to know where to get information and advice on

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what the system should be doing for them. This might apply to remote Aboriginal communities or other groups that because of geography, language, or other factors, need more interaction with officials to assist them with these issues.

We believe the Commission receives many calls because there is no institution that handles general inquiries from the public about unfairness in government or the private sector where these are not equality issues covered by the Act. We think that an organization like an Ombudsman could take the pressure off more specialized institutions like the Commission.

Recommendations:

30. We recommend that the Commission continue to deal with questions from the public and continue to assist potential claimants to draft their claims and assemble the materials necessary to support their cases.

31. We recommend that the Commission take a proactive approach in its role to ensure the accessibility of the claims process to individuals and groups who might otherwise be less informed about their right to equality in employment and services.

(c) Step 2 — Filing a Claim with the Tribunal

The Panel considered whether an equality claim should be filed first with the Commission or with the Tribunal.

We decided that the benefits of filing directly with the Tribunal outweigh the advantages of the Commission retaining some type of early complaint processing function. Even if the Commission were to make only preliminary-type decisions, there would still be the appearance of a conflict in roles. This apparent conflict would have a chilling effect on the Commission's ability to carry out promotional activities. As well, there would be delays inherent in any type of investigation function necessary for the Commission to make a preliminary decision. Any time saved in having a review of claims by the Commission would carry with it most of the disadvantages of the current system.

In the Panel's view, it would be preferable to have the impartial decision-making body already established under the Act make these decisions rather than to expect the Commission to perform a decision-making function.

Under the direct access system that we propose, it would make sense to allow a claimant alleging a breach of the Act to file a claim with the Tribunal directly.

The Tribunal should design the claim form and put it in the Rules because its members would be in the best position to establish what should be included.

As we will explain, the documents in support of the claim should be filed at the same time as the claim to save time and to reduce the complexity of the disclosure process.

Tribunal officials would automatically send a copy of the claim and all supporting material to the Commission as soon as the claim was filed. This would facilitate the Commission in its deliberations as to whether it would like to become a party to the claim.

The issue of who may file a claim will be dealt with later in this chapter.

Recommendations:

32. We recommend that claims be filed directly with the Tribunal.

33. We recommend that copies of all claims be sent to the Commission as soon as they are received to keep the Commission informed and to keep track of patterns of discrimination.

(d) Step 3 — The Tribunal Process

(i) Rules of Procedure

The Tribunal will have a central role in the direct access process.

The Act now provides that the Chair may make Rules of Procedure aimed at notice, the addition of parties, summoning witnesses, production of documents, discovery, pre-hearing conferences, the introduction of evidence, time limits and awards of interest. The Act provides for consultation with interested persons after the draft rules are published.

It is clear that the Tribunal will have to take rigorous control over its caseload and will require the necessary tools to do this. One of these tools must be the power to make Rules of Procedure that clearly have the force of law similar to the rules of courts. The Act should allow

the Tribunal to vary these Rules to ensure that justice is done in any particular case.

Recommendation:

34. We recommend that the Tribunal have power to make Rules of Procedure that have the force of law.

(ii) Filing Formal Claim Forms and Supporting Documents

The claimant should have to establish some reasonable and objective basis for a claim. We would expect that this requirement would be made clear in the Act and in the claim form that the Tribunal would design and place in the Rules.

The claim form should consist of a statement of the allegations of the breach of the Act, and either contain or be supported by a statement from the claimant setting out the facts and the evidence upon which the claim is based. The supporting material should also include documents and even witness statements, if available. The claim form should also contain basic administrative information currently found in the Tribunal's draft Rules of Procedure, for instance the name of the claimant, counsel, the preferred place for the hearing, current addresses and telephone numbers, the language of the proceedings, and special arrangements that would be needed for the hearing.

Based on the practice of some jurisdictions, it might be useful for claimants to prepare a questionnaire (either their own or one provided by the Commission or Tribunal in Rules of Procedure) asking respondents for a response to the claim and additional relevant information. A claimant might require assistance for this purpose. The purpose of the questionnaire would be to commence case preparation and the immediate sharing of information. Parties could define the issues to evaluate the merits of the claim and to identify the issues that could be resolved in ADR. The Commission would also use this information to determine whether it would support the claim based on established criteria that we will discuss later.

The respondent's reply to the allegations in the claim form, the answers to the questionnaire (with similar administrative information), and supporting documents would have to be returned by the respondent to the Tribunal within 30 days.

The claim and supporting material, the questionnaire, and the respondent's reply and documents would become evidence. The disclosure that occurs at this early stage would be supplemented by more disclosure as the issues became better defined and if ADR did not settle the case. If a claimant failed to meet the time limits for filing information, the claim could be dismissed. However, if the delay could be strongly justified, then an extension could be granted. If the respondent failed to file the required information, then the Act might deem the allegation to be admitted and a speedy hearing could result in a decision in favour of the claimant. However, there may be cases where the delay could be explained, in which case the Tribunal might grant an extension for filing the necessary information. An extension of time should require strong justification to avoid the kinds of delays that have created problems for the complaint process in the past.

The Panel does not think that this exchange of allegations, reply, information and documents should become a technical matter. Claims should not be dismissed based on technical objections, but only where there is a breach of natural justice.

Recommendations:

35. We recommend the Act require that a claimant have some reasonable and objective basis for an alleged human rights claim.

36. We recommend that the Tribunal be given power to design an appropriate claim form in its Rules of Procedure.

37. We recommend that the Act or the Rules of Procedure provide that the claim form and supporting material consist of the allegations of discrimination and a description of the facts. We also recommend that the disclosure process begin without delay and that the documents concerning the claim in the possession of the claimant be filed at the same time as the claim. The claimant should prepare a questionnaire that sets out the initial questions that the claimant has of the person alleged to have breached their rights. The Tribunal's Rules should deal with other disclosure issues to ensure that the process proceeds quickly and fairly.

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38. We recommend that the Act or the Rules of Procedures provide that the person responding to the claim must promptly file a reply, answers to the questionnaire and related documents within a specified time, such as 30 days.

39. We recommend that the Act or Rules of Procedure provide that if a claimant fails to meet the time limit the claim could be dismissed. If the person responding to the claim fails to meet the time limit, their defence could be struck out and the allegations of discrimination be deemed to be admitted. The Tribunal should be able to extend the time limit where there is strong justification.

40. We also recommend that the Act provide that a claim cannot be dismissed on technical objections, unless the defect breaches the rules of natural justice.

(iii) Assistance with Claim Preparation

As noted earlier, while the Commission and the Tribunal will have to answer general inquiries from the public, there is an issue of whether assistance should be provided to a potential claimant in preparing a claim and putting together the necessary evidence to proceed with that claim. Under the current model, the Commission provides this assistance.

One of the tasks of the Commission under the proposed new model would be to prepare detailed materials accessible to anyone who might wish to file a claim. These materials must be to assist claimants in deciding whether they have suffered discrimination. However, it would also be the responsibility of the Tribunal to provide materials on how to commence the claim process. The material would have to be simple enough to be understood with or without legal advice. It would describe how to collect relevant documents, how to prepare witness statements, and how the process would work. This would be useful even if the individual chose to be represented by legal counsel. The process we are recommending can be started even before obtaining counsel.

Both the Tribunal, with respect to procedural issues, and the Commission, concerning assistance in preparing a claim form, could utilize "1-800" information lines or the Internet. New technologies should be used to disseminate information about equality in general, and compliance and enforcement matters in particular, bearing in mind that the Internet is still not universally accessible, especially for members of the disability community and people whose first language is neither French nor English or who do not have access to computers.

As indicated earlier, Commission staff would continue to assist claimants to prepare their claim and inform them about the kind of evidence that would be required. There would be greater freedom if staff were permitted to be more proactive rather than requiring them to act impartially which is their current obligation. However, the provision of this assistance adds to the cost of the system. Those providing assistance and advice should also have the necessary training.

The Commission's role in the claims process will be explained later at Step 6. However it is important to note that the information obtained at this early stage may help the Commission decide whether to join as a party to the claim or perhaps even initiate its own claim. The system we are proposing maximizes the ability of the Commission to choose to support the cases that it thinks will do the most to maximize its advancement of equality. Because the Commission will select such cases to support before the Tribunal, it must have sufficient information to make this decision. Some of this information about an individual's or organization's claim might come through the initial contact with the Commission officials. Further, even if individuals making telephone inquires do not ultimately file a claim, the information they supply may provide the Commission with sufficient grounds to commence a public inquiry into the subject matter described in the calls using the power to initiate public inquiries that we discussed earlier in chapter seven.

Assistance would continue to be provided by unions and community groups in support of a claimant. Their connection to the communities they serve provides them with an understanding of the issues that affect their members and the necessary expertise. Further, members of the community would more likely trust a community advocacy organization than another sort of organization. The Commission would continue to develop partnerships with community organizations.

In some cases, legal assistance may be necessary in order to properly draw up a claim, especially in a complicated case of systemic discrimination. We will

deal later with the vital issue of legal assistance for those who want to use the Tribunal process to resolve a dispute involving equality in the workplace or in the provision of services (chapter eleven).

Recommendations:

41. We recommend that the Commission continue to provide assistance to claimants by assisting them with drafting their claims and putting together the necessary supporting materials. We recommend that legal assistance be available if necessary at this stage in preparing complex claims for filing with the Tribunal.

42. We recommend that the Commission and the Tribunal continue to provide materials to the public concerning how the claims process works and what is expected of claimants and respondents.

43. We recommend that the Commission pursue methods of involving community groups and labour organizations in assisting claimants in the claims process.

(e) Step 4 — Case Management

Under the direct access model, the Tribunal would become the central body for dispute resolution. It would retain its current adjudicative function. The Commission would no longer be responsible for deciding whether claims should be dismissed or referred to Tribunal.

Each claim would be assigned to a case management officer who would be in charge of ensuring that the claim went through the required steps before a hearing. The case management officer would not be an official with judicial functions similar to a member of the Tribunal, but would be a member of the Tribunal's staff. The official would not necessarily be responsible for ensuring that all the time limits were met by the parties, but would be responsible for ensuring that the paperwork was ready for the Tribunal member when needed.

Notice of the claim filed with the Tribunal should be served on the person(s) required to respond to the claim as soon as it was filed with the Tribunal.

Recommendations:

44. We recommend that each claim be assigned to a case management officer who would be responsible for piloting the claim through the process.

45. We recommend that the Rules of Procedure provide for immediate service of the claim and its supporting material on the person or persons who must respond to a claim.

(f) Step 5 — The Pre-Hearing Process

The Act should establish a pre-hearing process where the Tribunal could make determinations about whether a case should go to a full hearing. We think the Tribunal should be empowered to review the claims as they come in as part of a pre-hearing process of case management. One of the reasons it would be important to have full-time Tribunal members would be to review the cases on a daily basis.

Claims filed with the Tribunal would be examined by a Tribunal member whose job would be to determine whether the claim should proceed first through the pre-hearing screening process. The members of the Tribunal would share this task, perhaps on a rotating basis.

The function of the pre-hearing process would be to determine whether there was any merit to the claim or defence that would necessitate a full hearing before the Tribunal. The standards to be applied in the pre-hearing process will be described below.

In some instances it would be clear that cases should not proceed to a full hearing, for example, a case that does not come within the Tribunal's jurisdiction, one where the ground alleged to be the basis for the breach of the right to equality is not a ground under the Act, or one that is clearly devoid of merit. We also think that respondents, once they have received their copy of the claim, would also raise these issues by applying to the Tribunal for a quick determination of whether the matter should proceed to a full hearing, if the issues were not raised by the Tribunal member first. Similarly, the claimant might raise an issue concerning the validity of the defence raised by the respondent.

In the Panel's view, the Tribunal should be able to identify such cases and send notices to the parties

38. We recommend that the Act or the Rules of Procedures provide that the person responding to the claim must promptly file a reply, answers to the questionnaire and related documents within a specified time, such as 30 days.

39. We recommend that the Act or Rules of Procedure provide that if a claimant fails to meet the time limit the claim could be dismissed. If the person responding to the claim fails to meet the time limit, their defence could be struck out and the allegations of discrimination be deemed to be admitted. The Tribunal should be able to extend the time limit where there is strong justification.

40. We also recommend that the Act provide that a claim cannot be dismissed on technical objections, unless the defect breaches the rules of natural justice.

(iii) Assistance with Claim Preparation

As noted earlier, while the Commission and the Tribunal will have to answer general inquiries from the public, there is an issue of whether assistance should be provided to a potential claimant in preparing a claim and putting together the necessary evidence to proceed with that claim. Under the current model, the Commission provides this assistance.

One of the tasks of the Commission under the proposed new model would be to prepare detailed materials accessible to anyone who might wish to file a claim. These materials must be to assist claimants in deciding whether they have suffered discrimination. However, it would also be the responsibility of the Tribunal to provide materials on how to commence the claim process. The material would have to be simple enough to be understood with or without legal advice. It would describe how to collect relevant documents, how to prepare witness statements, and how the process would work. This would be useful even if the individual chose to be represented by legal counsel. The process we are recommending can be started even before obtaining counsel.

Both the Tribunal, with respect to procedural issues, and the Commission, concerning assistance in preparing a claim form, could utilize "1-800" information lines or the Internet. New technologies should be used to disseminate information about equality in general, and compliance and enforcement matters in particular, bearing in mind that the Internet is still not universally accessible, especially for members of the disability community and people whose first language is neither French nor English or who do not have access to computers.

As indicated earlier, Commission staff would continue to assist claimants to prepare their claim and inform them about the kind of evidence that would be required. There would be greater freedom if staff were permitted to be more proactive rather than requiring them to act impartially which is their current obligation. However, the provision of this assistance adds to the cost of the system. Those providing assistance and advice should also have the necessary training.

The Commission's role in the claims process will be explained later at Step 6. However it is important to note that the information obtained at this early stage may help the Commission decide whether to join as a party to the claim or perhaps even initiate its own claim. The system we are proposing maximizes the ability of the Commission to choose to support the cases that it thinks will do the most to maximize its advancement of equality. Because the Commission will select such cases to support before the Tribunal, it must have sufficient information to make this decision. Some of this information about an individual's or organization's claim might come through the initial contact with the Commission officials. Further, even if individuals making telephone inquires do not ultimately file a claim, the information they supply may provide the Commission with sufficient grounds to commence a public inquiry into the subject matter described in the calls using the power to initiate public inquiries that we discussed earlier in chapter seven.

Assistance would continue to be provided by unions and community groups in support of a claimant. Their connection to the communities they serve provides them with an understanding of the issues that affect their members and the necessary expertise. Further, members of the community would more likely trust a community advocacy organization than another sort of organization. The Commission would continue to develop partnerships with community organizations.

In some cases, legal assistance may be necessary in order to properly draw up a claim, especially in a complicated case of systemic discrimination. We will

deal later with the vital issue of legal assistance for those who want to use the Tribunal process to resolve a dispute involving equality in the workplace or in the provision of services (chapter eleven).

Recommendations:

41. We recommend that the Commission continue to provide assistance to claimants by assisting them with drafting their claims and putting together the necessary supporting materials. We recommend that legal assistance be available if necessary at this stage in preparing complex claims for filing with the Tribunal.

42. We recommend that the Commission and the Tribunal continue to provide materials to the public concerning how the claims process works and what is expected of claimants and respondents.

43. We recommend that the Commission pursue methods of involving community groups and labour organizations in assisting claimants in the claims process.

(e) Step 4 — Case Management

Under the direct access model, the Tribunal would become the central body for dispute resolution. It would retain its current adjudicative function. The Commission would no longer be responsible for deciding whether claims should be dismissed or referred to Tribunal.

Each claim would be assigned to a case management officer who would be in charge of ensuring that the claim went through the required steps before a hearing. The case management officer would not be an official with judicial functions similar to a member of the Tribunal, but would be a member of the Tribunal's staff. The official would not necessarily be responsible for ensuring that all the time limits were met by the parties, but would be responsible for ensuring that the paperwork was ready for the Tribunal member when needed.

Notice of the claim filed with the Tribunal should be served on the person(s) required to respond to the claim as soon as it was filed with the Tribunal.

Recommendations:

44. We recommend that each claim be assigned to a case management officer who would be responsible for piloting the claim through the process.

45. We recommend that the Rules of Procedure provide for immediate service of the claim and its supporting material on the person or persons who must respond to a claim.

(f) Step 5 — The Pre-Hearing Process

The Act should establish a pre-hearing process where the Tribunal could make determinations about whether a case should go to a full hearing. We think the Tribunal should be empowered to review the claims as they come in as part of a pre-hearing process of case management. One of the reasons it would be important to have full-time Tribunal members would be to review the cases on a daily basis.

Claims filed with the Tribunal would be examined by a Tribunal member whose job would be to determine whether the claim should proceed first through the pre-hearing screening process. The members of the Tribunal would share this task, perhaps on a rotating basis.

The function of the pre-hearing process would be to determine whether there was any merit to the claim or defence that would necessitate a full hearing before the Tribunal. The standards to be applied in the pre-hearing process will be described below.

In some instances it would be clear that cases should not proceed to a full hearing, for example, a case that does not come within the Tribunal's jurisdiction, one where the ground alleged to be the basis for the breach of the right to equality is not a ground under the Act, or one that is clearly devoid of merit. We also think that respondents, once they have received their copy of the claim, would also raise these issues by applying to the Tribunal for a quick determination of whether the matter should proceed to a full hearing, if the issues were not raised by the Tribunal member first. Similarly, the claimant might raise an issue concerning the validity of the defence raised by the respondent.

In the Panel's view, the Tribunal should be able to identify such cases and send notices to the parties

asking them to make oral or written submissions on the issue of concern to the Tribunal member reviewing the claim. In this way the pre-hearing process would encompass a "speedy hearing" on the merits and the claimant and respondent would receive an early decision on whether the claim should proceed to a full hearing just as a court would. We believe that if the Tribunal could do this, much time could be saved.

Though this is somewhat different from the approach of the courts in the pre-hearing process (where only the parties raise questions about the basic issues in the case), we think it is in keeping with the more activist stance that we believe the Tribunal should take generally with its caseload. There would be no appearance of bias if the Tribunal raised these issues with both claims and defences and gave the parties an opportunity to respond before making a decision.

The Tribunal member carrying out the pre-hearing review would have to be given a significant amount of discretion to decide what kind of hearing was required to make the decision. To save time, the Tribunal member might call for submissions in writing or perhaps even a short oral hearing of evidence relevant to the issue raised. The Tribunal might even call for affidavit evidence or ask that the parties develop an agreed statement of fact. Speedy hearings could be held by teleconference or video-conference because the issues would be quite narrow.

In this way, the Tribunal could decide which cases would require a full hearing and which cases could be dealt with more expeditiously by speedy hearing, bearing in mind that one of the purposes of having an administrative tribunal like the Tribunal decide such cases would be to circumvent the formalities of the court process. The Tribunal would have to actively take control of its caseload and ensure that cases without merit and other types of cases not requiring a full hearing could be disposed of appropriately. The Panel believes that an active approach is needed because the Commission would no longer be dismissing cases that it decides should not proceed to a full hearing. However, we should emphasize that the kind of hearing that we envisage here will lead to a decision on the merits of the claim, even if the decision is that the claim is not within the jurisdiction of the Act or is devoid of merit.

The pre-hearing process should be as expeditious as possible. The Tribunal should dedicate the services of a sufficient number of members to this function to avoid a bottleneck at this stage. Such a bottleneck would also delay ADR.

Recommendations:

46. We recommend that the Act provide for a pre-hearing process presided over by members of the Tribunal to review each claim that is received by the Tribunal to determine what kind of hearing is needed to make a decision on the merits of the claim.

47. We recommend that the Act provide that where the Tribunal member or members decide that the matter should proceed to a speedy hearing on an issue or issues, either by themselves or after receiving notice of a matter that should be dealt with in the pre-hearing process from the person responding to the claim, the Tribunal member should notify the claimant and other parties of the speedy hearing and the way that it will be conducted. We recommend that the Act provide the Tribunal member with sufficient discretion on how the pre-hearing should be held, consistent with the rules of natural justice, to enable the process to proceed fairly and efficiently. The Tribunal member should be able to ask for written or oral submissions to determine the issue.

48. We recommend that the Rules of Procedure provide a short, specified time period for carrying out the pre-hearing process.

(i) Standards for the Pre-Hearing Process

The pre-hearing review should determine whether claims should or should not proceed to a full hearing or an early, speedy determination of the merits based on clear standards. All court systems have a way of determining which claims have no merits or what legal bars exist to their proceeding to a full hearing.

Before going forward to a full hearing, claims should be carefully examined to decide whether they:

- were outside the Tribunal's jurisdiction (usually meaning outside the coverage of the Act);

asking them to make oral or written submissions on the issue of concern to the Tribunal member reviewing the claim. In this way the pre-hearing process would encompass a "speedy hearing" on the merits and the claimant and respondent would receive an early decision on whether the claim should proceed to a full hearing just as a court would. We believe that if the Tribunal could do this, much time could be saved.

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Before going forward to a full hearing, claims should be carefully examined to decide whether they:

- were outside the Tribunal's jurisdiction (usually meaning outside the coverage of the Act);

- were filed too late and the Tribunal decided not to accept them based on stated criteria for accepting late claims;
- were without merit for reasons discussed below in subsection (iii);
- were dealt with under another dispute resolution procedure, for reasons discussed in the section on multiple proceedings (chapter thirteen).

These concepts are discussed in detail in the sections that follow.

(ii) Limitation Periods

The Act now provides in section 41(1)(e) that complaints must be filed within a year of the last discriminatory act, subject to the Commission exercising its discretion to deal with a late complaint. The Act does not specify the criteria for exercising this discretion. Usually, the Commission considers a good faith explanation of the delay and a lack of prejudice to the respondent.

Employers and service providers expressed concern that the discretion was exercised without notice to them or without clear criteria.

Public policy has always required some boundaries on the right to commence legal proceedings. There are time limitation periods for most kinds of actions that prevent a person from suing another after a specific amount of time. This must be balanced with the idea that in the equality context, the Act is meant to advance the interests of individuals in society who may be the least likely to know about and have access to a procedure for ensuring their equal treatment. It cannot be assumed that union members will always be fully advised of their rights under the Act, though they are probably better off than others who might wish to file a complaint. Some individuals might not be aware of the harm done until after the time limit has passed; others may simply be unable to know what to do in time because of a disability.

There are several approaches to this issue.

We could recommend a short time limit and provide generous statutory or regulatory criteria for the Tribunal to decide to accept a late complaint. This would provide some certainty to respondents and would protect their interests in the event a late claim were litigated. However, this approach creates more work for the Tribunal and introduces a degree of uncertainty for respondents. A short time limit for a claim would be consistent with short time limits for filing a grievance under a collective agreement.

A second approach would be to recommend a longer time period with less discretion to accept a late complaint. For example, a two year period, consistent with many other legal time limits, could be established subject to extension only if a claimant were unable to properly decide about filing a claim because of a disability or if the claimant was unaware of the harm. In the latter case, the two years could run from the date the claimant became aware of the harm. Another approach might be to maintain the current one year time period, subject to these two exceptions.

We think the general limitation period for claims should remain as it is in the current Act, one year from the discriminatory act or from the last act of discrimination if there is a continuing series of related discriminatory acts as is often the case with harassment. However, we think that the Tribunal should be able to extend the time period where the claimant is incapable of filing a claim because of a disability or other serious reason or where the claimant cannot reasonably know that he or she has suffered because of a discriminatory act until after the year period is up. In these cases, the Tribunal should be able to extend the time for filing for a reasonable period to enable the claimant to file his or her claim.

This limitation provides greater certainty to potential claimants and respondents about the period of time for filing a claim. The time period would be the same as in the current Act, though not subject to the discretion of the Commission to extend the time for filing. With direct access to the Tribunal, the Commission would not be in a position to decide to extend time for receiving a claim because it might be one of the parties to a claim. Further, the Tribunal would need clear criteria for deciding which claims should be allowed to continue even if they were filed late. Our choice of time limitation would ensure that there are only two clear and specific exceptions on which the Tribunal could base a decision to allow or disallow a late filing. Claims that are very late in being filed are seldom successful and contribute disproportionately to delays in the system.

Recommendations:

49. We recommend that the general limitation period for claims remain as it is in the current Act, that is, one year from the discriminatory act or from the last act of discrimination if there was a continuing series of related discriminatory acts.

50. We recommend that the Tribunal be able to extend the time period in two specific cases where the claimant was incapable of filing a claim because of a disability or other serious reason; or where the claimant could not have reasonably known that he or she suffered because of a breach of the Act until after the year period was up. The Tribunal should have the power to extend the time for a reasonable period to enable claimants to file their claims.

(iii) Claims Without Merit

Section 41(1)(d) of the Act allows the Commission to refuse to deal with a complaint that is "trivial, frivolous, vexatious or made in bad faith." These words have a legal meaning relative to whether the legal disputes are a proper use of the court's time. A case is trivial if it is really too small a matter to use the resources of a court to decide. A frivolous case is one that is devoid of merit and perhaps even one that is advanced to delay matters or to embarrass the other party. A vexatious case is one made without reasonable or probable cause or excuse. A case started in bad faith refers to one that is initiated for a dishonest purpose. We understand that to the layperson these terms may seem to trivialize a matter that may be very important to an individual or an organization. For this reason the Commission is reluctant to use this basis for rejecting a complaint. We agree with the Commission and think that there should be terms that more clearly describe the criteria for dismissing a claim early in the proceedings.

Currently, under section 44(3)(b)(i), after an investigation has been finished and a report has been given to the Commission, the Commission may refuse to refer it to Tribunal when "having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted." Advocacy groups do not like the idea that the Commission has the power to dismiss complaints even for administrative or policy reasons and that access to adjudication can be denied without a determination of the merits of the complaint.

The Panel believes that it is inappropriate to give an impartial body like the Tribunal the power to dismiss a claim for administrative or policy reasons, rather than on the merits or lack of merits of the case. At the very least, there must be a standard based on legal principle so that all cases are decided on their merits. This means defining a test for determining which claims should proceed and which are without merit for the purposes of the Act.

The Tribunal will need a clear standard to apply to avoid legal battles over the proper standard.

The standard could be that the claim should be dismissed if it has no chance of success. This is the standard in civil proceedings in the courts. When this kind of challenge is made to a case, the courts will assume that all of the facts alleged can be proven and then decide whether the claim can legally succeed. Examples of this kind of decision are cases of lack of jurisdiction or where the distinction is not based on a ground in the Act. This would include cases where there is no evidence of discrimination on a ground listed in the Act or where undisputed facts clearly provide a defence.

We think the standard for the kind of case that should not go to the Tribunal for a full hearing should be "claims without merit or foundation and where there is no reasonable likelihood that further proceedings would establish that the claim has merit." The same standard could be applied to a meritless defence, with necessary modifications. This test could be used to dismiss all or part of a claim or defence. There may be some allegations in a claim or defence that should proceed to a full hearing despite other issues that appear to be meritless to the Tribunal early in the process after a speedy hearing.

Once this pre-hearing process has taken place, the case may be dismissed or the Tribunal may only have to determine a question of jurisdiction or remedy in a speedy hearing. A claim or defence may also be reduced to a single question of law, such as an interpretation of a section of the Act, for the Tribunal to decide. The Tribunal may decide that the claim or the defence should not be rejected completely, but make findings on certain points that are established at this stage in the case. The Tribunal may restrict the issues remaining to the issue of damages for example, if a *prima facie* case of liability were established but no defence was revealed by the documents provided by the respondent.

All of these types of determinations will help to make the process as efficient as possible, while ensuring that every claimant gets some sort of hearing. This would dispose of some meritless cases and act as an incentive for both parties to develop their case quickly and to provide full disclosure to the Tribunal early in the process.

We also considered a two step claims process. This would require claimants to prove they had a *prima facie* case before they could proceed to a full hearing. However, this type of system is problematic. Until 1993, the immigration process had a two stage process in which a preliminary hearing was held in refugee cases before an adjudicator and a member of the Refugee Division to screen out cases that had no "credible basis" for the refugee claim. If either member decided that there was a credible basis, then the case was referred to the Refugee Division for full hearing. The approach was unsuccessful because it referred 95% of cases, added delays to the system and resulted in many applications for judicial review. For these reasons, the system was eliminated in 1993. We do not think that there is any point in repeating this experiment.

Recommendation:

51. We recommend that the Act empower the Tribunal to dismiss all or part of a claim or reply after a speedy hearing, where the claim or reply is without merit or legal foundation and where there is no reasonable likelihood that further proceedings would establish that the claim or defence has merit or legal foundation.

(iv) Claims Made in Bad Faith

Claims that are brought in bad faith should not be allowed. This would include claims filed as retaliation. The Tribunal would have to be satisfied before dismissing a claim, defence or some part of them for this reason that the claim or defence was advanced for dishonest reasons.

Recommendation:

52. We recommend that the Tribunal be able to dismiss a claim or defence made in bad faith.

(v) Claims Already Dealt With

The Tribunal should be able to dismiss a claim or issues in a claim that it has already decided.

Recommendation:

53. We recommend that the Tribunal be able to dismiss a claim that it has already decided.

(vi) Claims Dealt with Using Other Procedures

The standards would also include one for dismissing claims based on acts that were fully and properly dealt with in other proceedings, such as grievances, unjust dismissal proceedings, workers compensation claims, civil actions for wrongful dismissal and court proceedings under the equality provisions of the Charter.

This raises the issue of how the Tribunal would deal with multiple proceedings about the same issues which is discussed in chapter thirteen.

(vii) Appeal of Preliminary Rulings

We considered whether the decision to dismiss a case at this early stage by a single Tribunal member should be reviewable by some higher authority. The problem with creating a review process is that it might become routine, resulting in a loss of some of the efficiency gained by having a direct access process where a claimant is entitled to a decision on the merits of the case by the Tribunal. The best protection would be to have the Tribunal member dismissing a case write a short set of reasons for the decision.

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54. We recommend that the Tribunal provide short reasons for claims or replies they have dismissed in whole or in part by way of speedy hearing within the pre-hearing process. There should be no special review mechanism for these decisions.

(g) Step 6 — The Commission's Role in a Claim

The Commission's role in the new claims process would be to choose important claims to support through to Tribunal. The Commission would no longer

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(g) Step 6 — The Commission's Role in a Claim

The Commission's role in the new claims process would be to choose important claims to support through to Tribunal. The Commission would no longer

investigate claims in order to provide a report so Commissioners could decide whether to dismiss them or send them to Tribunal as is presently the case. Rather, it would engage in a process of selecting claims that met specific criteria for support. We will discuss these criteria later in this section. After making this selection, the Commission's role would be to prepare the claim for mediation and a Tribunal hearing. The Commission would therefore have a proactive enforcement role. The Commission would have the right to join in a claim based on its selection criteria during a short period specified in the Rules. It should also be able to join in a claim later in the process with the approval of the Tribunal.

The Commission would obtain the information necessary to make its decision about whether to join in a claim initially from the claim form and supporting documents. This material, plus information it might have obtained during the initial inquiry stage, should be sufficient to allow the Commission to decide whether to join the claim as a party shortly after receiving this material. Throughout the Tribunal process the Commission might decide to examine the claim more fully in order to decide whether it met the criteria for becoming a party to the claim.

The Commission would need to have criteria to select the cases that it would join as a party before the Tribunal. We believe these criteria should be based on the principle of achieving the greatest advancement of equality.

The criteria could consist of a number of general principles contained in the Act, supplemented from time to time by the objectives stated in the Commission's Annual Report. The criteria could be established through the Commission's policy-making process and therefore be the subject of consultations carried out on an *ad hoc* basis or through consultation with an advisory body consisting of interested persons and organizations.

(i) General Principle for Establishing Criteria for the Commission Becoming a Party to the Action

Generally, the Commission should choose to join in cases where the public interest in achieving the greatest advancement of equality is very important. The criteria would allow the Commission to focus its resources, rather than having it appear before the Tribunal in every case. It is the Panel's view that the Commission was trapped in a numbers game by the current complaints process and that it would be able to target its resources better if it had greater flexibility in choosing the cases to which it became a party. It should be noted that the direct access process will still allow claimants to pursue claims where the individual or private interest may be paramount. We will propose a separate approach to providing legal assistance to these type of claimants.

In establishing a set of criteria, the Commission should consider:

- whether the case raises a serious issue of systemic discrimination (as might be found in a major policy of an employer or service provider);
- whether the claim raises a new point of law or might settle one that remains in doubt;
- whether the complexity and importance of the claim requires the specialized support of the Commission;
- whether the claim would provide a benefit for many other individuals in the same position as the claimant;
- whether the duty to ensure equality in employment and services was breached by activity authorized by statute or regulation;
- whether there is a glaring unfairness in the case that should be pursued simply to ensure that justice is done;
- whether the case is one of public interest sufficient to justify the Commission joining.

The criteria would be applied by a Commissioner who was available on a full-time basis or by an experienced member of the staff, so that there would be no need to wait for a monthly meeting of Commission members as is the current practice for the determination of most complaints.

In most cases, it would be clear from the claim form that it should be supported. That is, the issues should be sufficiently clear to understand their nature and potential for affecting other people. If it were not clear from the face of the claim and supporting documents, we think the Commission should be able to file a Notice with the Tribunal, advising all the parties and the Tribunal that it needed more time to decide whether to support a claim.

The Notice would have the effect of placing the claim "on hold" for a very short specified time period. The period could be set out in the Act or in regulations made by the Commission or by the Governor in Council on the recommendation of the Commission. It should be sufficient to enable the Commission to decide whether or not to support the claim before the Tribunal,

but not long enough to delay matters and injure the claim's chances of success. The period could be between 30 and 90 days. During this time, the Commission would carry out whatever research it needed to decide whether to support the claim further in the litigation process.

The Commission's research would not be similar to that performed by investigators for the purposes of establishing the basis of a Commission decision to dismiss a complaint or refer it to Tribunal. Rather, it would be a short analysis of the case based on the underlying idea that the claim support process is aimed at enforcing the Act through litigation of claims. These short inquiries could be carried out by the legal staff of the Commission, with the assistance of para-legals and case officers under the supervision of the Commission lawyers. This would require an increase in resources for the legal branch of the Commission, but would cost much less than the current investigation function.

The Commission's role in the claims process would be unique. The Commission would support the claim by joining as a full, participating party. Because of its proactive role in equality issues, it should be able to have some flexibility in the allocation of its resources while the litigation was in progress.

Further to our discussion concerning the time period during which the Commission could join a claim simply by filing a Notice with the Tribunal and advising the parties of its intention, if the period for deciding to join a claim passed and new information came to light indicating that the public interest in the issues was greater than originally believed, then the Commission should be able to apply to join in a claim on application for intervention to the Tribunal. Conversely, if new information arose indicating that the Commission should not support the claim, then it should be able to advise the parties and the Tribunal that it wished to remove itself from the claim. Under such circumstances, the Commission could provide any information about a claim that it gained during its research to the Registrar of the Tribunal and the parties. This information would more than likely relate to the issue of whether or not the Commission should support the claim and the Commission's criteria rather than the merits of the case. The material might still be useful to the parties.

We considered the possibility of giving the Commission officer researching a case that the Commission has joined, or is deciding whether to join, certain powers to obtain information from respondents in addition to the disclosure procedures of the Tribunal. On reflection, it is the Panel's view that it might be better not to provide the Commission official with such powers because this would appear to create a bias in the system in favour of the Commission and the claimant, because the respondents to the claim would not have such powers.

The benefit to the claimant of having the Commission join as a party would be the added expertise and resources that the Commission has for enforcing the Act.

Making the Commission a full party would give it the right to continue a claim even if the claimant settled based on personal interest. If this happened, the material supporting the claim would still support the Commission's decision to ensure that the claim proceeded through the Tribunal system in the public interest. The claimant could be called as a witness at the hearing. It would be important to allow the Commission to continue without the claimant because the Commission had chosen the case for the special reasons set out in its criteria, reflecting the importance of the case in the overall advancement of equality.

Even in cases where the Commission decided not to join as a party, a claimant should still be able to provide evidence that would convince the Commission to initiate a claim itself or to change its mind about joining the claim.

Though the Commission will normally take the lead in leading evidence and making representations in a claim it has joined, Commission counsel and the claimant could agree to another approach. In any case, claimants would always be able to retain their own counsel to present any aspect of the case they felt was not presented by the Commission counsel. The Commission would present the case from the Commission's point of view based on the original selection criteria.

There is a question of whether the claim would be subject to ADR while the Commission was considering its position on the claim. The basic principle of the direct access approach is that all cases would be equally entitled to a ruling from the Tribunal. This suggests that claims that the Commission might want to join should be subject to ADR like all the others. However, if the claim became the subject of ADR before the Commission decided whether to support the claim, then public interest issues the Commission would want to see addressed in a settlement might not be considered.

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We think that the Commission should be given sufficient time to decide whether to join in the claim before alternate dispute resolution is offered, though we would place the onus on the Commission to decide this issue as quickly as possible. As noted earlier, a Notice from the Commission that it will join or is considering joining as a party in a case should postpone the offer of mediation to ensure that the Commission can be a party to the settlement discussions. Even if the claimant's interest is settled as a result of ADR, the Commission should still be able to continue as party to the case. The Commission's joining a case may reduce the likelihood of a purely individual settlement of a claim because the Commission would always be looking for a broader, proactive, preventative settlement because of the criteria for its joining a claim in the first place.

Recommendations:

55. We recommend that the Act empower the Commission to initiate claims itself as it may do currently and also be empowered to join claims brought by other individuals and organizations as a full party to the claim. The Commission should be able to join simply by filing the appropriate Notice with the Tribunal and advising the parties within a specified time. The Commission's function in such cases would be to prepare the claim for alternate dispute resolution (ADR) and hearing in the Tribunal process.

56. We recommend that the Act specify some of the criteria for claims that the Commission will initiate and join as a party and allow the Commission to develop others in consultation with interested individuals and organizations.

57. We recommend that these criteria be based on the principle of achieving the greatest advancement of equality. The criteria could include:

- **whether the case raises a serious issue of systemic discrimination (as might be found in a major policy of an employer or service provider);**
- **whether the claim raises a new point of law or might settle one that remains in doubt;**
- **whether the complexity and importance of the claim requires the specialized support of the Commission;**
- **whether the claim would provide a benefit for many other individuals in the same position as the claimant;**
- **whether the duty to ensure equality in employment and services was breached by activity authorized by statute or regulation;**
- **whether there is a glaring unfairness in the case that should be pursued simply to ensure that justice is done;**
- **whether the case is one of public interest sufficient to justify the Commission joining.**

58. We recommend that the criteria be applied by a member of the Commission who would be available on a full-time basis or by an experienced official with sufficient training to carry out this function.

59. We recommend that where it is not clear from the claim and supporting material that this is a claim that meets the criteria for joining as a party, that the Act or Rules of Procedure should enable the Commission to notify the Tribunal and parties that it needs a short time, specified in the Act or the Rules, to make inquiries and decide whether or not to join in the claim. The claim would wait for the Commission to make this decision and ADR would commence once it was made. The Commission should make every effort to make this decision as quickly as possible.

60. We recommend that even if the Commission decides not to join as a party in the short time specified, it retain the right to join later, based on new information, on application to the Tribunal. Similarly, we recommend that the Commission be entitled to withdraw from a case based on new information.

Claims Not Supported by the Commission

Claimants whose claims were not the subject of a Notice from the Commission that the claim would be supported or a Notice that the Commission was looking into the claim to decide whether to support it, would proceed through the Tribunal process without any delay except those inherent in a first-come, first-served system.

(h) Step 7 — Alternate Dispute Resolution (ADR) Mechanism

It is the Panel's view that ADR could be provided as a step in the Tribunal process. Settlement discussions are a natural part of the litigation process. The fact that it would be carried out in the process would emphasize to the parties the value of attempting to reach a settlement.

The impartiality of the Tribunal would reduce the likelihood that there would be a sense that the settlement process was biased in favour of one party or in favour of a system that seemed to be organized to process as many complaints a year as possible.

We think that ADR should take place in the Tribunal process. We are aware that making ADR part of the Tribunal process might appear to make the ADR process more focused on the legal issues. The benefits of using ADR, even if it does not result in a settlement, are that it focuses the parties on settlement early in the process, provides an exchange of information, and narrows the issues that remain to be resolved at the hearing stage and so appears to fit well into the process at this stage.

In addition to ADR in the Tribunal process, we are recommending in chapter five an internal responsibility system for employers and service providers. Part of this will be a system for dealing with internal complaints about the failure of the employer or service provider to ensure equality. ADR might be a part of this system as well and would provide for ADR in a non-litigation context.

We will expand on our views about the ADR function in chapter twelve.

Recommendation:

61. We recommend that alternate dispute resolution be offered early in the Tribunal process.

(i) Step 8 — Tribunal Disclosure Powers

We considered what types of disclosure rules would best suit the new direct access process. The process must be fair to all parties and must minimize the possibility of delay. The rules should be flexible enough that disclosure in each case can be tailored to its particular demands. The Tribunal will need considerable power to order disclosure tailored to each case. There will not be a Commission investigation in each case so parties will not have as much information on which to proceed. However, we do not want to suggest overly technical rules.

The Tribunal issued Draft Rules of Procedure on May 28, 1999. Rule 6 requires the Commission and the respondent to give written notice of the material facts they will rely on, the legal issues, the relief sought, all relevant documents that are not privileged, all relevant documents that are privileged (explaining the claim for privilege) and the witnesses they plan to call, with a summary of their testimony. A complainant who plans to lead evidence or adopts a position different from the Commission's must similarly notify the parties. A party who gives notice of relevant documents must provide copies to all parties. A party calling an expert must file an expert's report. The Tribunal states in its Annual Report that the draft rules seem to be working well.

Participants from all parts of the spectrum at our consultations voiced support for time limits and full disclosure early in the process.

Both court rulings and academic writings support broad disclosure. In our view, justice is better served by complete information. Naturally, the Tribunal would retain the power to control disclosure if it might lead to danger for a witness or if it were not relevant. The Tribunal should have the power to order written or oral examinations for discovery, which provides an opportunity for the parties to ask questions of each other under oath either orally or in writing. The answers would become evidence. This would supplement the questionnaire that the claimant would ask the person responding to the claim to answer very early in the process. The Tribunal should also be empowered to view the workplace or place where a service was delivered if this was necessary to understanding the case. Bearing in mind the imbalances of power that may be present in human rights cases, we would want the Tribunal to ensure that the oral discovery process was not used to harass a claimant or to delay proceedings.

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As noted earlier, the disclosure process should start with the filing of the claim and supporting material. It should continue within short specified time limits. The Tribunal should have the power to set time limits for these actions.

Efficiency also results where it is possible for the parties to agree to all of the facts at issue. These agreements about facts could be written out and the Tribunal could use them instead of witnesses. This would save time and money, as the parties could make representations about this kind of case by teleconference, without the need for travel expenses.

In some larger cases, for example those involving systemic discrimination, we think that the Tribunal should have the power to order compilation of information, even where the compilation of information is not already in existence. This power would eliminate the problem of sifting through huge amounts of information. Such a request might require the respondent to perform calculations, reconciliations, analyses, adjustments, estimates or forecasts that are relevant and reasonable in the case. The courts have found such a power appropriate even in situations where it was not expressly provided for in the governing law, where the power was said to exist by necessary implication from the nature of the regulatory authority that was conferred on a tribunal. Without this power, the Tribunal would be able to compel the production of the documents containing this information in the form of raw data, but the witness would have been restricted to using unprocessed, unanalysed, and disorganized documents. Taking the time to sift through the documents or obtaining the information through oral evidence may in some cases jeopardize the timely and economic resolution of the proceeding.

An application for a speedy hearing might be made after the exchange of information and documents about the case for a quick decision from the Tribunal for or against the claim. This would ensure that parties took their disclosure obligations seriously.

The Tribunal will have to build up experience with their power to tailor the kind of disclosure needed in a case where the needs of justice in a particular case depart from the standard set in the rules. We are confident that the Tribunal will develop a good sense of how to use this power in a variety of cases so it can actively take control of its caseload.

Recommendations:

62. We recommend that the Tribunal Rules ensure that the parties to the Tribunal hearing are fully informed about the relevant facts. The Act or the Rules of Procedure should give the Tribunal sufficient discretionary power to ensure that the method of disclosure of oral and documentary evidence meets the needs of the case.

63. We recommend that the Act provide the Tribunal with the power to order a party to compile information that would otherwise be disclosed in an unorganized form, where the compilation would assist the Tribunal in the interests of efficiency and justice.

(j) Step 9 — Procedure for Speedy Judgment Late in the Case

There will be cases where the disclosure of oral and documentary evidence will provide the Tribunal with enough material to decide that the case meets the meritless claim test described earlier or perhaps is ready for final decision. This information may not have been available at the time the claim was filed during the prehearing process. There should be a way of forestalling a full hearing if it is clear from the evidence disclosed before the actual hearing that the claim or the defence should not proceed any further.

Recommendation:

64. We recommend that the Act provide for a speedy judgment process at any time before a full hearing for cases that can be disposed of on the merits after disclosure is complete. The Tribunal Rules should provide for a simple application procedure for access to this process.

(k) Step 10 — Interim Orders

The Act does not currently empower the Tribunal to make interim orders.

However, in *Canadian Liberty Net v. Canadian Human Rights Commission* (1998), the Supreme Court of Canada said that the Trial Division of the Federal Court has the power to issue interim injunctions to

prevent breaches of the Act pending a Tribunal hearing. In that case, the court had the discretion to issue an injunction preventing the continued operation of a hate line pending the decision of the Tribunal. The power of the court was not limited to hate message cases.

This would be a useful exceptional power for the Tribunal to have so that it could prevent breaches of the Act pending a hearing and a decision by the Tribunal. During our consultations, we heard that interim measures might be useful in sexual harassment cases to enable the workplace to keep functioning while the harassment case was resolved. The Tribunal could be approached in such a case to make an order requiring that a claimant be allowed to remain at her job while the matter proceeded to a hearing. In emergency cases, the Tribunal might order that the victim of racial harassment be allowed to refuse work where the discrimination at issue might cause danger to health or security, until measures were put in place to remove that threat in the workplace. The Tribunal could order an interim cessation of hate messages pending a decision of the Tribunal.

The Tribunal then would have to take steps to reach a final decision quickly in order to minimize costs and uncertainty during the interim period. The Act could state that the Tribunal would have the power to confirm or change the interim order after a full hearing and make its final order retroactive.

In other cases, an interim order might not be necessary if the Tribunal could handle the need for a quick determination by expediting a claim.

Recommendation:

65. We recommend that the Tribunal be given the power to make interim orders that would prevent injustice in a claim, pending the final hearing of the claim. The Tribunal should also have the power to make interim orders that could be confirmed or changed at the final hearing.

(l) Step 11 — Status Hearings

As an incentive to the speedy processing of claims, we believe the Act should provide for a mandatory status review of every claim still in the system and not heard by the Tribunal after a certain period of time, such as nine months. The Tribunal should have the power to dismiss a claim or strike out a defence and deem the allegations of discrimination to be admitted if the delay can be attributed to the claimant or the persons responding to the claim. If the delay was caused by the Tribunal itself, then the status hearing should prompt an expedited full hearing.

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66. We recommend that the Act or the Rules require the Tribunal to conduct status hearings after a period of time, such as nine months, has passed since the filing of the claim and for which no hearing has been commenced. We recommend that the Tribunal have the power to dismiss a claim or strike out a defence and deem the allegations of discrimination admitted if the delay can be attributed to the claimant or the persons responding to the claim.

(m) Step 12 — Interventions

The Act now provides that the Tribunal conducts a hearing after due notice to the Commission, the complainant, the persons against whom the complaint was made and any other interested party at the discretion of the Tribunal member. Those who receive notice are entitled to a full and ample opportunity to appear, present evidence and make representations, either by themselves or through counsel.

The direct access process and the Commission's focus on larger public interest cases would suggest that there may be more interventions than at present. We think the Tribunal should be able to allow intervenors to join in the case, but subject to the terms of participation that the Tribunal decides in the interest of giving the Tribunal maximum control over its process.

Recommendation:

67. We recommend that the Act empower the Tribunal to allow intervenors to participate in the claim procedure. The Rules of Procedure should provide a procedure for this and also empower the Tribunal to place limitations on the participation of intervenors added by this procedure.

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(n) Step 13 — Amendments to Claims or the Addition of Parties

Similarly, we think that the Act should reflect the current practice that allows amendments and the addition of other parties to claims, subject to protections for other parties from prejudice resulting from such additions.

Recommendation:

68. We recommend that the Rules of Procedure provide that claims can be amended and new parties added during the hearing process, subject to the rules of natural justice.

(o) Step 14 — The Hearing

A date should be set for a hearing early enough in the process to provide an incentive for the parties to prepare quickly. The date should not be set too far in advance because parties may not be able to get ready in time for good reason and a set date may waste valuable Tribunal resources.

The direct access model could potentially result in a greater number of hearings than the current system. This would require more full-time members and resources to handle more cases. However, proper case management, use of the pre-hearing process with speedy hearings, the use of ADR and vigorous control of hearings by the Tribunal members, should make the caseload manageable.

The Tribunal would likely want to have a case management conference for all cases. This would happen rapidly for claims that enter the pre-hearing process. The conference, which could be held by telephone, would be necessary in all other cases to define issues, documents and other matters necessary for the hearing.

Hearings would usually be held in the city closest to where the claimant lives as is now the case.

However, there may be cases involving policy issues that may only need written evidence with written or telephone submissions. The Tribunal should have the power to tailor the nature of the hearing to the specific case, subject to the rules of natural justice. The hearings should be as informal and as uncomplicated as possible.

Some tribunals have established rapid hearing processes that might be studied for the purpose of tailoring the hearing process to the type of claim and the needs of the parties. These include: batch hearings, where several cases are scheduled for one hour slots on the same day with a fast decision afterwards; expedited hearings, where the hearing time is limited to two hours; a party-managed hearing, where the parties provide all the documentation; group appeals. Parties may be willing to agree to these types of hearings and give up their right to a full hearing in order to secure an early date. Consent would likely be necessary because a shortened hearing may not comply with the requirement of natural justice that a party be able to fully state his or her case.

We mention these other types of proceedings not because they will inevitably lead to a more efficient process for all claimants, but because they represent ideas for the streamlining of hearing processes that have been offered by other tribunals. Options like these may appeal to some claimants and we think that the Tribunal should be prepared to explore ways to effectively manage its caseload.

The important issue of legal representation of claimants and smaller respondents will be dealt with in the next chapter.

Recommendations:

69. We recommend that enough Tribunal members be appointed on a full-time basis to carry out the duties under the new system.

70. We recommend that the Rules provide for a direct claim process that is informal and expeditious. We think that case management conferences should be held in each case to clarify and narrow issues, to attempt to reach agreements on facts and to deal with other issues that will assist in making the process as efficient as possible.

71. We recommend that the Tribunal explore methods for tailoring hearings to the needs of parties, offering expedited processes and other innovative processes to vigorously control its caseload.

72. We recommend that the Tribunal be empowered to request that the Commission appear to deal with a point on which the Tribunal wishes to hear representations.

(n) Step 13 — Amendments to Claims or the Addition of Parties

Similarly, we think that the Act should reflect the current practice that allows amendments and the addition of other parties to claims, subject to protections for other parties from prejudice resulting from such additions.

Recommendation:

68. We recommend that the Rules of Procedure provide that claims can be amended and new parties added during the hearing process, subject to the rules of natural justice.

(o) Step 14 — The Hearing

A date should be set for a hearing early enough in the process to provide an incentive for the parties to prepare quickly. The date should not be set too far in advance because parties may not be able to get ready in time for good reason and a set date may waste valuable Tribunal resources.

The direct access model could potentially result in a greater number of hearings than the current system. This would require more full-time members and resources to handle more cases. However, proper case management, use of the pre-hearing process with speedy hearings, the use of ADR and vigorous control of hearings by the Tribunal members, should make the caseload manageable.

The Tribunal would likely want to have a case management conference for all cases. This would happen rapidly for claims that enter the pre-hearing process. The conference, which could be held by telephone, would be necessary in all other cases to define issues, documents and other matters necessary for the hearing.

Hearings would usually be held in the city closest to where the claimant lives as is now the case.

However, there may be cases involving policy issues that may only need written evidence with written or telephone submissions. The Tribunal should have the power to tailor the nature of the hearing to the specific case, subject to the rules of natural justice. The hearings should be as informal and as uncomplicated as possible.

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(p) Step 15 — Dealing with Charter Challenges to the Act

A tribunal may now determine whether another Act or regulation is inoperative because of a conflict with the Act based on the primacy principle. There was an issue under the current Act as to whether the Commission should also have the power to refer a constitutional question concerning a provision of the Act to the Tribunal in the course of a complaint.

In *Bell and Cooper v. Canada* (1996), the Supreme Court of Canada held that neither the Commission nor the Tribunal had jurisdiction to decide whether a provision of the Act conflicts with the Charter. No express or implied power to determine questions of general law was granted to the Commission or to the Tribunal. However, the Court did acknowledge that the Tribunal could interpret other statutes and referred to the *Druken* case, a primacy case, where it was held that the Act rendered a provision of another federal statute inoperative to the extent that they conflicted. The Court was also of the view that the Tribunal could deal with its constitutional division of powers jurisdiction, that is, to decide whether the matter belonged before it or a provincial human rights decision-maker. It could also determine Charter arguments with respect to remedies as well.

The June 1998 amendments to the Act created a permanent, specialized Tribunal and provided in section 50(2): "In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter." Thus, Parliament has given the general power to determine questions of law to the Tribunal. In the Panel's view, this includes Charter questions.

Based on our support of the direct access approach to the claims process, the issue of the Commission's power to refer Charter questions to the Tribunal has disappeared because the Commission will no longer be responsible for referring cases to the Tribunal.

(q) Step 16 — The Orders

Pursuant to section 53 of the current Act, the Tribunal may now order that a respondent cease a discriminatory practice as well as such measures to prevent it from happening again. It may order compensation, including up to $20,000 for pain and suffering, and appropriate interest. An additional amount of up to $20,000 may be ordered if the respondent discriminated "willfully or recklessly." It may also order a reinstatement of rights, opportunities or privileges lost by the complainant.

Pursuant to section 54, in hate message cases the Tribunal may order the respondent to cease the practice and to take measures to prevent it from happening again as well as order compensation to a victim who was identified in the hate message. The Tribunal may also order a penalty of up to $10,000, based on the circumstances of the case and the state of mind of the person who communicates hate messages.

Though the amendments made to the Act in June, 1998 raised the limit for injury to feelings and self-respect from $5,000 to $20,000, we have decided to recommend the removal of these limits entirely. This signals the importance of these kinds of compensation in human rights matters. The Tribunal can be expected to develop its own views on the damages that are appropriate for discrimination in each case. It may decide that there should be a sort of ceiling such as the one established by the Supreme Court of Canada in personal injury cases.

Though we are not making recommendations to tinker with the Act as much as offering a vision of how it should be, we think that the compensation provisions in the remedial section of the Act should be as broad as possible to ensure that a claimant might receive all the compensation due. For example, though there are cases in which benefits lost to the complainant have been awarded, the Act as currently drafted does not specifically refer to benefits as compensable items. Perhaps a more broader term such a "compensation for any loss" should be used to ensure that there are no technical debates about this kind of issue before the Tribunal.

We also think that compensation for "pain and suffering" should be renamed to refer to compensation for "dignity, feelings and self-respect." The Act formerly referred to suffering with respect to "feelings and self-respect." We would add the term dignity as the Supreme Court of Canada has recently stated in the *Law* case that "dignity" is at the heart of the concept of equality.

We considered the issue of whether the Act should specifically empower the Tribunal to award costs. We do not think that costs of legal proceedings are generally appropriate in human rights cases under the Act. However, we do think that costs should be awarded against a party that has intentionally delayed the hearing of a case or is guilty of misconduct in the proceedings.

A special exception was made to the powers of the Tribunal in cases involving *Employment Equity Act*

employers. That Act amended the *Canadian Human Rights Act* to provide that the Tribunal may not order an employer bound by the EEA to adopt a special program with positive policies, goals and timetables for achieving representation of employment equity groups. This provision would prevent the Tribunal from making an order in some systemic discrimination cases. We discuss this amendment in chapter three.

There is a need for speed in hearing and deciding claims. One way of doing this is to impose time limits for holding the hearing and the rendering of an early order after its conclusion. The problem is how to enforce the time limits. If failure to meet the limits nullifies the proceedings, then they will be counterproductive as a waste of time and resources and damaging to the Tribunal's credibility. Perhaps the best thing to do is to provide that the hearing and decision should be finished as quickly as possible. This would allow the Tribunal to develop its own internal mechanisms for getting its work done in a timely way.

The Tribunal reports in its 1999 Annual Report, that "As the Tribunal's senior members have become increasingly conversant with preliminary issues and motions, delays are fewer and decisions are more expeditious." We expect that this trend would continue with a larger, full-time Tribunal.

Recommendations:

73. We recommend the removal of the limits on the amount of compensation that the Tribunal can award for what we would wish to see referred to as injury to "dignity, feelings and self-respect."

74. We recommend that the compensation provisions be expanded so that it is clear that the claimant may receive compensation for any loss suffered as a result of a breach of the Act.

75. We recommend that the Tribunal be empowered to award costs where one of the parties has deliberately delayed the proceedings or where they have engaged in misconduct during the course of the hearing.

76. We recommend that the Act provide that the hearing process be carried out as expeditiously as possible within the limits of natural justice for the parties.

(r) Step 17 — Enforcement of Tribunal Orders

Pursuant to the current section 57, a Tribunal order may be enforced as though it were an order of the Federal Court of Canada.

The Panel heard during consultations that the Commission did not have the resources to enforce Tribunal orders. We also heard about some significant orders that were not being fully enforced by the Commission.

It is the Panel's view that the Commission should be responsible for enforcing any order obtained from the Tribunal.

The Commission could also use the Tribunal ruling as the basis for guidelines about the issue resolved by the Tribunal so that employers and service providers would know more about how to comply with the Act so that the ruling had a broader application than the single case.

Recommendations:

77. We recommend that the Commission monitor and enforce orders of the Tribunal.

78. We recommend that the Commission use Tribunal orders as the basis for policy or rule-making so that the ruling in a particular case will affect other similar situations, perhaps preventing more claims about a similar problem.

(s) Step 18 — Appeals of a Tribunal Order

Currently, an unsuccessful party to Tribunal proceedings may seek judicial review of the order in the Trial Division of the Federal Court. This is not mentioned in the Act itself, but is the result of the operation of the *Federal Court Act*.

In a number of cases over the past few years, the Supreme Court of Canada has said that orders of the Tribunal are not entitled to deference, except on factual findings. This is in part due to the fact that the Tribunal was not a permanent body and in part due to the fact that human rights tribunals generally have not been considered to be technical bodies like some administrative tribunals. The courts appear to have been reluctant to allow them complete power to determine human

rights questions without retaining the power themselves to ensure that tribunal interpretations were in line with current judicial thinking. To add to this, the former Tribunal Panel was composed of individuals appointed from a list of eligible members with varying levels of expertise.

Since that time, the Tribunal has been established as a permanent body. Section 48.1 of the Act requires that appointees "must have experience, expertise and interest in, and sensitivity to, human rights." The Tribunal can be expected to develop the kind of expertise that would justify the courts giving greater deference to its decisions.

The Tribunal currently consists of a full-time Chair and Vice-Chair and up to 13 part-time members. There will have to be more full-time appointments to deal with the increased number of cases that will likely arise as a result of the recommended changes. The greater expertise that will come with more full-time members dealing with more cases will have the effect of increasing the credibility of the Tribunal.

To enhance this development, there should be a provision called a "privative clause" that would ensure that the courts would defer to the Tribunal's decisions on procedural and factual matters. On the other hand, questions of jurisdiction and the interpretation of the Act should be reviewed by the Federal Court of Appeal. One of the reasons we think that this is a good idea is because the Tribunal would have power to decide Charter questions because of the June, 1998 amendments to the Act, and it already has the power to decide that other federal statutes are inoperative because of the primacy principle. We think there should be judicial review by an appellate rather than a trial level court because the developments in the Tribunal structure indicate that this is a senior Tribunal. The Court of Appeal would be informed by the interpretation of the Tribunal.

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CHAPTER 11
Assistance in the Claims Process

Issue

The Commission currently provides assistance to individuals who wish to file a complaint. It usually appears before the Tribunal to present the evidence and to make the representations to support the complaint. The Panel considered the question of what assistance should be provided, given that every claimant has the right to present a case before the Tribunal and the Commission will no longer routinely appear in every case before the Tribunal.

The Current Environment

Currently, individuals wishing to file a complaint call the Commission to ask about their case. Commission officials provide advice on the complaint process and discuss whether they have a case that could be filed as a complaint. If the individual wants to file a complaint, Commission officials will assist them with filling out a complaint form.

The Commission usually investigates the complaint and in so doing organizes the case for the Commissioners who decide what will happen to it. In the situation where the Commission refers the complaint to Tribunal, section 51 of the Act provides that the Commission must act in the public interest when appearing before the Tribunal.

The role of the Commission lawyer at the hearing is somewhat complicated. The lawyer does not technically represent the complainant. The Commission will advise the complainant that its lawyer is acting for the Commission and does not exclusively represent the complainant. However, the complainants are advised that they may rely on the Commission lawyer to lead evidence and to make representations in support of the complaint. Complainants are also advised that they are entitled to retain a lawyer.

The Need for Legal Assistance

The experience in other jurisdictions demonstrates that a complainant must be represented before a tribunal. In the United Kingdom, complaints are filed directly with the tribunal or court, and a complainant may receive some assistance from the relevant human rights commission. Those without representation seldom succeed. Until 1997, complainants in Québec were allowed to go to the Tribunal by themselves if the Commission dismissed their complaint. Those who did so were rarely represented and rarely successful.

Further, the practice in Canada is that complainants are represented before tribunals or boards of inquiry at public expense.

The Commission's experience is that complainants often retain their own counsel.

Legal Assistance in Cases that the Commission Joins

The claims process we recommend will allow the Commission acting in its enforcement capacity to choose the cases that are of sufficient public importance. The Commission may also choose cases where a matter might be considered to be of public importance simply because of the specific injustice in the case. In such cases, the Commission lawyer will represent the Commission as well as the claimant. However, claimants will always be free to retain their own counsel at their own expense.

Legal Assistance in Cases that the Commission Does Not Join

The remaining issues are whether and how to provide assistance to claimants whose claims have not attracted Commission support.

The Need for Assistance

In our view, providing assistance to claimants is key for the direct access model to be successful. As noted above, the experience in the United Kingdom and Québec have shown that unrepresented claimants are rarely successful, partially because respondents are often large well-resourced corporations or governments. This will be particularly true in the federal sector. The practical result of no assistance would be to deny access. The human rights tribunal process is often complicated and requires experience in human rights in order to assemble and argue a case successfully. In the human rights context many claimants do not speak either official language or have disabilities that may make it difficult for them to access the system. Unrepresented claimants would require more time at the Tribunal hearing. Counsel can help keep the proceedings moving and reduce costs of lengthy hearings.

Two Models

What is the best way to provide this assistance? The Panel considered two basic models. The first is the legal aid model, either integrated with the systems in place in the provinces or a system that would pay for counsel for claimants based on a strict tariff similar to that of the provincial legal aid programs. The second option is a legal clinic which would have a full-time staff of lawyers and para-legals that would provide advice and representation to claimants.

(a) The Legal Aid Model

The legal aid model has a number of positive features. It would provide some choice of local counsel to claimants. It might also allow for greater contact between claimant and lawyer, though the tariff levels would not likely allow for too many interviews before the hearing.

The legal aid model also creates a number of difficulties. Negotiations with provincial legal aid organizations would likely be difficult and the funding arrangements would be complicated. We are concerned that the bulk of resources could be diverted to the administering body. In addition, the local legal aid organization may not wish to take on more administrative duties. The legal aid system may not ensure access to lawyers with the expertise necessary to handle a human rights claim efficiently and the lawyers likely would not gain significant experience with the Tribunal to represent claimants effectively.

(b) The Clinic Model

The second option, the Clinic Model, offers a number of advantages. Clinic counsel would develop expertise in the equality area and with the Tribunal process. The Clinic could benefit from the economies of scale, and with greater experience the Clinic staff should gain a greater ability to represent claimants efficiently and effectively before the Tribunal. This expertise would more effectively offset the experience that counsel for the larger respondents develop before the Tribunal. The Clinic would be able to offer an efficient division of labour between lawyers and para-legals who would also develop experience in assisting claimants effectively with the more routine matters in the process, such as disclosure of documents and other pre-hearing procedures.

The Clinic could develop partnerships with community organizations that already have expertise in developing and presenting claims. They might make some type of financial arrangement to provide assistance to groups wishing to use their own experts rather than a Clinic staff person. Criteria should be developed by the Commission and Clinic for this purpose. These criteria would likely focus on the expertise of the organization, its funding needs and the importance of having the perspective of the community group in the case. Many claimants may feel a greater level of trust if they can obtain some assistance from experts within their own community.

The main disadvantage of the Clinic Model is associated with delivering services to claimants located in different parts of the country if the clinic is centralized. We heard the concerns of equality groups about telephone interviews and the difficulties associated with the centralization of the current investigation process. For the time being, we recommend that the Clinic start operations in a central place so that staff can develop expertise and operating practices together. Later, as the Clinic develops confidence, it may extend out and open regional offices. In the long run this may be a very beneficial approach to delivering legal services to claimants across the country.

There would have to be some limits on the service that the Clinic would provide if it is to operate economically. One of these limits relates to the point at which a claimant wishes to initiate a claim and seeks information about how to do this. As stated above, currently the Commission provides this service through its intake process. In the direct access model, initial contact with the claimant might range from a quick telephone call to a number of hours spent determining whether the claimant wishes to file a claim. The Panel is of the view that the Commission staff should continue to assist the claimant with filling out a claim form and providing information about what happens next in the process. The Commission could refer difficult cases to the Clinic, but generally, the initial contact and claim writing should continue to be done by the Commission. The majority of calls are about matters that fall outside the jurisdiction of the Commission, and the Commission has developed expertise both in identifying those who have human rights complaints and in referring others to alternate sources of assistance.

Regional offices could be used to provide direct contact with an intake officer. We do not believe that the Tribunal should provide advice on the filing of claims. It is important for the Tribunal to remain neutral.

Assisting in filling in claim forms and providing advice may not be perceived as a neutral function.

If claimants do not wish to take the advice given by the Commission intake staff, then they may simply ignore that advice and proceed to the Tribunal.

In our view, all claimants who need assistance should receive it from the Clinic and we strongly recommend that the Clinic should have sufficient resources to represent all claimants. However, if contrary to our recommendation there are not enough resources for all claims, we would recommend criteria for deciding which claimants receive funded counsel. One approach to ensuring that the Clinic assists those who need it most would be to use means testing. Individuals who could afford their own representation would be required to do so. The problem with this approach is that if the test were based only on gross income, a person with little discretionary income might be deterred from bringing a valuable claim because of the cost. Therefore, any limits established by the Clinic should take into account not only the means of the claimant, but also the nature of the claim, its complexity and whether it promotes the advancement of equality. Cases that are clearly without a chance of success might be given lower priority. The criteria should be such that representation is usually provided. The Clinic should have some discretion about who it helps, though it should not duplicate the Commission's process for deciding which claims it should join.

It might be useful to restate why we think it is important to provide legal representation at public expense for claimants in this system. The Supreme Court of Canada has stated very often that the Act, like other human rights legislation, embodies fundamental values of this country. They have been described as quasi-constitutional. Further, it has been public policy to make this system more accessible to those who wish to pursue a breach of their rights than the regular court system. The human rights system is designed not just to provide a remedy to individuals but also to protect the public interest by eliminating discriminatory practices likely to affect others in the future and advancing equality. From this point of view, denying legal assistance imposes on the claimant the cost of achieving a public benefit, which may not be realized where the claimant cannot afford legal assistance.

When the Clinic Would Become Involved

Unless the claim is one of the exceptional cases where a member of the Clinic is involved in drafting the claim, the claim should be referred to the Clinic for the assignment of counsel when filed with the Tribunal. The Tribunal would provide a copy of the claim and supporting materials to the Clinic. The claim would be assigned to a legal counsel with the Clinic who would then be in charge of the case. That counsel would then involve para-legal assistants as necessary to ensure efficient and economic assistance in the process. Where a community organization could take over a case, the Clinic counsel could ensure the application of the criteria that the Clinic and Commission would develop for the involvement of the community organization.

Cost of the Clinic

We have undertaken some preliminary work on costing the proposed legal clinic model based on 1998/1999 Canadian Human Rights Commission data. It would appear that the savings from removing the current investigation and conciliation functions from the Commission could balance out the cost of providing legal assistance through the legal clinic model.

A Surcharge to Help Pay for the Clinic

We think that the Minister could consider using a surcharge type of system to ensure that the Clinic has sufficient resources. For example, the Clinic could require successful claimants to give 5% of their award to the Clinic as a nominal payment for the legal services. A party found to have breached the duty to ensure equality might likewise be required by the Tribunal order to pay something towards the legal costs of the successful claimant.

Disagreements with the Commission in the Conduct of a Case

In cases where the Commission has become a party, there may be disagreements between the Commission's lawyer and the claimant about whose interests are being represented by the Commission's lawyer. If there is a fundamental disagreement between the Commission and the claimant, should the Clinic assign a second publicly-funded lawyer to the claim? Obviously, this could create a drain on the resources available to the claims processing system and should only be considered in exceptional circumstances.

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Claimants who have serious concerns about the Commission's position in a case could be allowed to make an informal application to the Tribunal. The Tribunal would have the power to decide whether the conflict was sufficient to require two publicly-funded counsel to be appointed to one case. The Clinic would supply separate counsel if the Tribunal was convinced that it was necessary. The Tribunal has experience with the issue of determining that a complainant's differences with the Commission require separate counsel. In such cases, it would ask the Commission to pay for the separate representation that it finds necessary. We prefer this approach to having the claimant go to the Clinic to ask for separate representation.

In considering the question of the provision of legal services, it is the Panel's view that the kinds of cases the Commission decides not to join as a party will usually be less complex. It is anticipated that these cases will be somewhat simpler and more focused on the private interest of the claimant. This should make them easier to settle, and they should be less complex to argue and defend. The more specific focus should make their defence less complicated.

To ensure that there is no conflict of interest between the Commission legal services unit and the Clinic, the Director of the Clinic should be isolated from any possible influence by anyone concerning the legal assistance provided by the Clinic.

Respondents That Need Legal Assistance

There may well be respondents who need legal assistance when they find themselves the object of a human rights claim. The Clinic would be oriented towards representing claimants so it would not be in a position to provide legal assistance to respondents without creating perceptions of conflict of interest. It is important to avoid situations of potential conflict of interest.

If respondents have need for publicly-funded legal assistance, they should be able to apply to the Tribunal for help. The Tribunal should be able to order assistance to be paid from the Commission's budget on a defined tariff based on clear evidence of the lack of ability to afford counsel. There will likely be few cases where this is an issue.

Though some may say this gives the respondent choice of counsel that the claimant will not get, this must be balanced against other factors, such as the need to avoid a conflict of interest with the Clinic. The concern about the choice of counsel is not a practical one considering the lack of lawyers with the expertise on the federal Act to defend human rights cases.

Recommendations:

80. We recommend that in cases where the Commission decides not to join the claimant as a party in the claim, that the claimant receive independent and effective legal assistance at public expense.

81. We recommend that the Commission continue to carry out its function of receiving calls for preliminary advice from the public and to assist claimants with identifying whether they have a case, the drafting of a claim form and advising the claimant on the collection of documents and other supporting materials. More complicated cases could be referred to the proposed legal Clinic.

82. We recommend that a Clinic be established to provide claimants whose cases have not been joined by the Commission, with legal assistance in the preparation and presentation of their cases before the Tribunal.

83. We recommend that the Clinic establish itself in Ottawa initially, and then expand to offer regionally based service as it develops.

84. We recommend that the Clinic develop partnerships with community and advocacy organizations with expertise in developing and presenting human rights claims and that there be a mechanism for funding such representation based on criteria developed by the Commission and the Clinic in consultation with interested parties.

Claimants who have serious concerns about the Commission's position in a case could be allowed to make an informal application to the Tribunal. The Tribunal would have the power to decide whether the conflict was sufficient to require two publicly-funded counsel to be appointed to one case. The Clinic would supply separate counsel if the Tribunal was convinced that it was necessary. The Tribunal has experience with the issue of determining that a complainant's differences with the Commission require separate counsel. In such cases, it would ask the Commission to pay for the separate representation that it finds necessary. We prefer this approach to having the claimant go to the Clinic to ask for separate representation.

In considering the question of the provision of legal services, it is the Panel's view that the kinds of cases the Commission decides not to join as a party will usually be less complex. It is anticipated that these cases will be somewhat simpler and more focused on the private interest of the claimant. This should make them easier to settle, and they should be less complex to argue and defend. The more specific focus should make their defence less complicated.

To ensure that there is no conflict of interest between the Commission legal services unit and the Clinic, the Director of the Clinic should be isolated from any possible influence by anyone concerning the legal assistance provided by the Clinic.

Respondents That Need Legal Assistance

There may well be respondents who need legal assistance when they find themselves the object of a human rights claim. The Clinic would be oriented towards representing claimants so it would not be in a position to provide legal assistance to respondents without creating perceptions of conflict of interest. It is important to avoid situations of potential conflict of interest.

If respondents have need for publicly-funded legal assistance, they should be able to apply to the Tribunal for help. The Tribunal should be able to order assistance to be paid from the Commission's budget on a defined tariff based on clear evidence of the lack of ability to afford counsel. There will likely be few cases where this is an issue.

Though some may say this gives the respondent choice of counsel that the claimant will not get, this must be balanced against other factors, such as the need to avoid a conflict of interest with the Clinic. The concern about the choice of counsel is not a practical one considering the lack of lawyers with the expertise on the federal Act to defend human rights cases.

Recommendations:

80. We recommend that in cases where the Commission decides not to join the claimant as a party in the claim, that the claimant receive independent and effective legal assistance at public expense.

81. We recommend that the Commission continue to carry out its function of receiving calls for preliminary advice from the public and to assist claimants with identifying whether they have a case, the drafting of a claim form and advising the claimant on the collection of documents and other supporting materials. More complicated cases could be referred to the proposed legal Clinic.

82. We recommend that a Clinic be established to provide claimants whose cases have not been joined by the Commission, with legal assistance in the preparation and presentation of their cases before the Tribunal.

83. We recommend that the Clinic establish itself in Ottawa initially, and then expand to offer regionally based service as it develops.

84. We recommend that the Clinic develop partnerships with community and advocacy organizations with expertise in developing and presenting human rights claims and that there be a mechanism for funding such representation based on criteria developed by the Commission and the Clinic in consultation with interested parties.

85. We recommend that the government provide sufficient resources to ensure that all claimants receive legal assistance at public expense. In the event that the Clinic does not have sufficient resources to represent all claimants at once, they should develop and apply criteria taking into account the means of the claimant, the nature of the claim, its complexity and whether it advances equality. The denial of legal assistance should be the exception.

86. Where a conflict arises between a claimant and the Commission in the conduct of a case that the Commission has joined as a party, the claimant should be able to go to the Tribunal to have it decide whether there is a sufficient conflict to justify separate legal assistance from the Clinic. The Act should provide that the Director of the Clinic should not be subject to outside interference on how the Clinic's legal assistance should be provided.

87. We recommend that respondents who need legal assistance should be able to apply to the Tribunal for legal assistance to be paid from the Commission's budget on a strictly defined tariff where they can clearly demonstrate that they cannot afford it on their own.

CHAPTER 12
Alternatives to the Claims Process

Background

Most human rights legislation in Canada provides for the settlement of discrimination issues by alternate means such as conciliation or mediation as an important part of the complaints process. The Tribunal hearing is usually seen as the last resort.

There are many forms of alternative dispute resolution. Some are particular to specific fields. In the labour relations area, there is fact finding and voluntary/compulsory arbitration, final offer selection and mediation-arbitration. In light of the variety of mechanisms, we are including the following descriptions of various dispute resolution methods adapted from the Law Society of Upper Canada, *Short Glossary of Dispute Resolution Terms*, July 1992:

- **Negotiation** — discussion between the parties to identify some joint action they might take to resolve their dispute
- **Early neutral evaluation** — a third party is present when the disputing parties, in confidence, present their respective cases to each other for the first time; early neutral evaluation usually takes place just after the complaint or dispute resolution process has begun; the third party helps identify the issues, assesses the respective strengths of the cases, formulates a plan for proceeding, and may encourage the parties to settle
- **Mediation** — a neutral third party with no decision-making power structures the negotiation and facilitates communication, helping the parties come to their own mutual conclusion about an acceptable settlement of their dispute; the mediator may make recommendations if asked to do so
- **Conciliation** — a third party acts as a channel of communication between the disputing parties; often used interchangeably with the term 'mediation' although the Commission uses the terms to mean different things; Commission conciliators have been described as "directive", not simply a neutral third party acting as a facilitator
- **Expert advice and assessment** — a third party gives advice on the issues
- **Arbitration** — a mutually acceptable and neutral third party hears the case and then makes a decision as to the outcome

The Current Situation

We addressed the question of whether the Act and current practices could be improved.

The Act currently provides a separate, formal process for the conciliation of complaints, which results in a number of settlements each year. Though the Commission promotes settlement at all stages of the process, the Act contemplates that formal conciliation is a separate stage of the process. The Commission reports that a small percentage of cases are resolved prior to investigation.

Under the current Act, the Commission may appoint a conciliator to attempt to settle a complaint at any time after a complaint has been filed, or, if the complaint has not been settled by an investigator in the course of investigation, referred to another body for resolution, or dismissed. The investigator cannot be appointed as the conciliator as well.

The Act provides that the information received by the conciliator in settlement talks is confidential and cannot be disclosed without the consent of the person who gave the information. This confidentiality is necessary in order to ensure that the parties feel they can discuss settlement openly.

As a matter of practice, the Commission will appoint a conciliator only after an investigation is concluded and the investigator has filed a report. However, settlement is attempted both before and after investigation.

The Auditor General's Report states that Commission conciliators receive about six days of training. Because the Commission represents the public interest in the conciliation process, it is not entirely a neutral party. The Commission facilitates settlement, provides information about Tribunal decisions on remedies, and protects the public interest. Conciliators will formulate objectives for the settlement based on the investigation, their knowledge of Commission policy and previous decisions of the Tribunal. They consult their managers. The parties may not know that the conciliators are going to advance Commission objectives. The conciliator telephones the complainant to discuss terms and then presents them to the respondent. The person who is the subject of the complaint is rarely involved in the settlement talks. The respondent is usually represented

by a lawyer or an officer of the company and complainants usually look after themselves.

The Tribunal also attempts to settle complaints before hearing, although there is no specific provision for this in the Act.

Section 48 of the Act provides that settlements of complaints reached anytime before a Tribunal hearing starts must be approved by the Commission. Amendments to the Act in June 1998 empower a party or the Commission to seek enforcement of settlements by application to the Trial Division of the Federal Court.

It should be noted that some complaints are settled between the parties and simply withdrawn without ever going through the formal approval process.

The Case for Greater Use of Conciliation and Mediation

Experience in both the federal and provincial jurisdiction in recent years makes a compelling case for the increased use of alternate methods for settling claims in the process we recommend.

The 1998 Auditor General's Report described the Commission's conciliation process and reported on its impact. Since 1996, about 18% of cases have been settled; 11% either before or during investigation and 7% at a later conciliation stage. About 60% of cases that went to this later conciliation stage were settled. The Report says that the conciliation stage itself took about 11 months on average, and the total time from the filing of the complaint until the completion of the conciliation averaged 45 months.

The Auditor General recommended the adoption of a mediation process similar to one being used in Ontario. The Ontario Human Rights Commission (OHRC) introduced mediation in 1997. This involves voluntary mediation by a neutral, independent mediator, early in the process. In its recently published assessment of about five months of experience in 1998, 72% of the cases sent to mediation were settled. The overall satisfaction rate for all parties was 74%, and 87% of participants said they would choose the mediation process again (though the actual number of responses to the survey was fairly small). The OHRC attributes much of this success to early and voluntary mediation, the perceived neutrality of the mediators, and the confidentiality of the process. Education has helped participants understand what to expect from mediation and how to prepare themselves for a successful mediation. However, we also received submissions stating that the Ontario process imposes undue pressure on complainants to settle.

Most provincial commissions have a mediation process.

Although not provided for in the Act, in 1998 the Canadian Human Rights Commission implemented a pilot project offering voluntary mediation before investigation. This generally occurs as soon as the complaint is signed, and tends to be a more neutral, less directive settlement process than conciliation, a more interest-based type of mediation. The Commission has evaluated the pilot project and will make a decision soon on the long-term use of mediation.

The Canadian Human Rights Tribunal introduced mediation in 1996. Tribunal members receive formal training in mediation. About 56% of parties to complaints referred to the Tribunal by the Commission voluntarily agreed to mediate and about 70% of these complaints were settled.

The Tribunal does not offer mediation in some cases: where the complaint is about a statute; where others might be affected by a systemic issue; where the case will likely set an important precedent; where a settlement appears unlikely; and where the interests of justice appear to require a hearing on the merits.

Specific Issues

In the direct access model we propose, mediation would be primarily a part of the Tribunal process. A number of specific questions arise.

(i) The Use of Mediation by the Tribunal

Should mediation be offered as a means of settling human rights claims in the dispute resolution process that we are proposing?

It is the Panel's view that the mediation of disputes offers a potentially efficient and beneficial way of resolving disputes in a way that is consistent with the goals of the Act and the interests of the parties and of the public.

Mediation should take place early in the process. The quicker an equality claim can be settled, the quicker the parties can get back to work in an improved work environment. However, the parties may refuse to settle early for various reasons. Therefore, mediation should be available at any point in the process, subject to some indication that the parties wish to settle. The fact that a claim is on the way to a hearing may encourage earlier settlement. The current Commission complaints

process often resulted in the referral of relatively few cases to the Tribunal, which may have been an incentive for some respondents to wait. The high success rate for settlement at the Tribunal stage shows that it is never too late in the complaints process to settle.

Mediation offered at the Tribunal stage should not prevent the Commission intake staff from attempting an informal early settlement. Intake officers should have sufficient training to be able to make a phone call or use some other means to help resolve a simple claim at an early stage.

Claims that are, in the Panel's view, clearly outside the jurisdiction of the Tribunal or without merit should be dealt with through the pre-hearing process before mediation is offered. In these situations the efficient use of scarce Tribunal resources is more important than early settlement. The Tribunal would likely dismiss such cases after a speedy hearing in the pre-hearing process. However, if it is not clear that the claim lacks merit or that it is outside the jurisdiction of the Tribunal, the Tribunal should attempt mediation, subject to the rules in the next section.

(ii) Are There Some Cases that Should Never Be Referred to Mediation? If So, Who Decides and According to What Rules?

We referred earlier to the types of cases where the Tribunal will not offer mediation. The list is open-ended and may include the following situations: where the claim is about an act authorized by statute, for example where a statute provides that a service is available to one group of people but not another; where others besides the claimant might be affected by a systemic issue (although, where an issue comes to the Tribunal as a properly constituted representative case as contemplated by these recommendations, a systemic settlement might be arrived at by mediation); cases where the Tribunal is of the view that it should decide a case that will set a precedent for how the Act will be interpreted and applied in the future (for example, a situation where the decision of the Tribunal on a certain common employment policy could affect many employers with the same type of policy); cases likely to be of high public interest unless parties agree in advance that the terms of settlement will be made public; where a settlement appears unlikely, for example, where one of the parties has made it clear that it will not settle; on the basis that the interests of justice appear to require a hearing.

This list outlining the kinds of cases that should not be mediated should continue to be established as a matter of Tribunal policy. The list can be modified after the Tribunal gains experience with the new process and the place of mediation within it.

The Tribunal member who is responsible for determining whether a case should be moved through the preliminary hearing process should also make the determination whether a particular case is one where mediation should not be offered according to these rules.

The Tribunal could also provide mediation services in cases that do not fit the rules but where the parties are insistent.

(iii) Voluntary vs. Mandatory Mediation

In the Panel's view, mediation should be voluntary, but should be offered in as many cases as possible. Parties should be advised early in their experience with the Tribunal about the benefits of mediation.

There should be a presumption in favour of offering mediation to the parties to a claim. However, the final decision remains with the parties about whether to take advantage of the offer or not.

(iv) Confidentiality

(a) The Discussions

Mediation discussions as well as any other types of settlement discussions should remain confidential. This follows the standard rule for settlement negotiations in civil law suits. The parties must be confident that what they say in these discussions cannot be used later to support a finding of liability. To do otherwise would remove the incentive to negotiate.

(b) The Final Settlement — Some Considerations

Confidentiality clauses for settlements may be contrary to the public interest in educating the public about human rights issues. However, respondents would normally want to avoid the stigma of a finding, or even an accusation of discrimination. This provides an incentive to settle which would be reduced if they knew the claim would be made public. Further, claimants may also wish to keep the matters private. These wishes for confidentiality must be balanced with the public interest in the educational value of publishing information about how a particular inequality situation was resolved. Publicizing the outcome may assist other claimants in understanding their rights and might also assist other employers or service providers in

understanding how to comply with the Act and may promote future settlements by informing parties of the terms of the past settlements of similar cases.

(v) Powers and Procedures for Mediators

Mediation should be provided by Tribunal members who receive specific mediation training. However, the Tribunal member should not be the member who hears the case if mediation is not successful. The Tribunal should have formal measures in place to ensure that information provided to the Tribunal member who conducts the mediation is not available to the Tribunal member who hears the case. The Act should provide that whoever conducts the mediation is not a compellable or competent witness in the proceedings and that the information disclosed in mediation is confidential and may not be disclosed without the consent of the person who gave the information.

If the volume of cases is high, the Tribunal should be able to engage independent mediators to deal with the overflow on a case by case basis. These contractors should also be properly trained and qualified to carry out this task.

(vi) The Final Settlement

The Tribunal should be given the power, similar to the courts, to make consent orders to give effect to settlements. This is necessary when the settlement contemplates that the parties will implement the settlement over a period of time. Though this may not be necessary when the settlement consists only of the payment of compensation, parties should be encouraged to formalize the settlement through an order. The parties should be required to provide a copy of the settlement to the Commission so that it can keep track of trends not only of settlements, but also of the patterns of discriminatory behaviour that produce equality claims.

The Commission will of course receive a copy of the settlement in cases where it has become a party because a settlement requires the agreement of all of the parties. In claims having a large public interest component involving the Commission, the settlement should include a focus on the important educational role a settlement may serve. A claimant might wish to settle by herself, but the Commission may continue the matter as a party to the claim which it has chosen because of the high public interest in the issues raised by it. The Commission will often seek broader remedies in the public interest to end systemic discrimination that will benefit many people other than the claimant. However, mediation may achieve the public interest objectives of the Commission allowing it to consent to the order in its capacity as one of the parties.

Where the Commission is not a party, we considered whether the reporting of settlements to the Commission should be required. Care should be taken to avoid creating a situation that might encourage the parties to settle privately outside the system by withdrawing the claim. In this type of case, publicizing the terms of the settlement could be left up to the parties. Arriving at a settlement may also be easier in this type of case since the Commission will already have taken the public interest into account in deciding not to join as a party. The public interest component may be less serious in cases the Commission does not join. This gives the parties greater latitude to settle the claim in their own interests. This is not to say that there is not a public interest generally in all human rights cases. Many claimants will be concerned about the effect the case may have on the public interest and may well include in their settlement demands the kind of remedy that the Tribunal might normally award, in recognition of the public interest in the advancement of equality. We concluded that in this type of case, the Act should require that the claimant provide a copy of the settlement to the Commission for the purposes of keeping track of trends of breaches of the Act and settlements.

Where the Commission is not a party to the claim, there may be situations where the Tribunal becomes concerned that an issue of public interest is still important in the context of a settlement. In this case, the Tribunal should have the power to give notice to the Commission that an important public interest issue has arisen and ask if it wishes to present evidence or argument on the issue as a "friend of the court."

Settlements that are finalized as consent orders of the Tribunal should continue to be enforceable as an order of the Trial Division of the Federal Court.

(vii) Remedying Power Imbalances Between the Parties

What steps can be taken to remedy a power imbalance that may occur between the parties?

In mediating human rights claims there is a concern that a well-resourced and represented respondent may overpower a claimant. One way of resolving an imbalance is to ensure that the claimant has representation. The claimant may wish to have a particular person

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assist during the process or call on the Clinic to provide assistance. The Tribunal member could suggest a call to the Clinic or conduct the mediation in recognition that one party may need more explanation than another.

The mediator needs to be trained to recognize a possible power imbalance and to take steps to modify the process to help equalize it. The following initiatives may help:

- restating the non-adversarial and consensual nature of mediation;
- rehearsing the ground rules for negotiation;
- bringing discussion of the imbalance into the open;
- using male, female or culturally diverse mediators as appropriate;
- suggesting "shuttle mediation" (meeting with the claimant and respondent separately);
- making sure translation services are available;
- ending mediation when power imbalances are compromising the process;
- allowing the parties to end mediation.

If power imbalances are great enough, mediation should be rejected as a means of settlement.

Recommendations:

88. We recommend that Commission staff may attempt informal early settlement if it appears to them that the matter could be easily resolved before a claim is filed.

89. We recommend that the Act provide that mediation be offered within the Tribunal process that we have recommended.

90. We recommend that mediation be carried out as early in the process as possible. However, it should remain available to the parties throughout the process, if it appears to the Tribunal that it might resolve the matter.

91. We recommend that mediation be voluntary, but should be encouraged by advising claimants and respondents of its benefits.

92. We recommend that the Tribunal develop and refine guidelines about the kinds of cases where it should not offer the parties mediation, based on the nature of the claim, the public interest issues at stake, the likelihood of settlement and the interests of justice. However, mediation may be offered if both parties insist.

93. We recommend that mediation be confidential.

94. We recommend that mediators be adequately trained for the task. Mediations should be carried out by Tribunal members. However, the Tribunal member should not be the member who hears the case if mediation is not successful. The Tribunal should have formal measures in place to ensure that information provided to the Tribunal member who conducts the mediation is not made available to the Tribunal member who hears the case. The Act should provide that whoever conducts the mediation is not a compellable or competent witness in the proceedings and that the information disclosed in mediation is confidential and may not be disclosed without the consent of the person who gave the information. In case of high demand, the President of the Tribunal Panel may hire trained mediators.

95. We recommend that the Tribunal have the power to make consent orders to give effect to settlements that can be enforced through the Federal Court, Trial Division as is the case now.

96. We recommend that in cases where the Commission has joined as a party, the Commission will have to approve the terms of settlement as a party if it is to be bound by the settlement.

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97. We recommend that in cases where the Commission has not joined as a party, the Act require parties to provide a copy of the settlement they have reached to the Commission. They should be able to agree on whether the Commission can use the settlement for educational purposes, with or without the names of the parties.

98. We recommend that in cases where the Commission is not a party, the Tribunal be able to ask the Commission whether it wishes to make any representations where the Tribunal member thinks there is an issue of public interest that should be addressed.

99. We recommend that where the Tribunal finds a power imbalance between claimants and the persons alleged to have breached their equality rights, it must take active steps to resolve the imbalance. If a resolution cannot be found then the mediation should be stopped.

CHAPTER 13
Multiple Proceedings

Issues

One of the issues that the Panel considered was the fact that discrimination issues are being raised before many different kinds of decision-makers, with the result that the same issues may be tried and decided over and over by the same parties. This creates a number of problems. Re-litigation uses up expensive quasi-judicial resources. It may also produce inconsistent decisions which could cause confusion about what employers and service providers are expected to do to comply with the Act. Multiple proceedings can contribute to delay and are very expensive. They can also frustrate the remedial goals of human rights legislation by bringing a case before decision-makers who cannot order the appropriate remedy.

The Act

Section 41(1) of the Act now provides that the Commission may refuse to deal with a complaint where it is satisfied that the victim should exhaust grievance or review procedures that are reasonably available, or where the complaint could be more appropriately dealt with either initially or completely, using a procedure provided under another Act.

The Federal Court of Appeal has interpreted the latter power narrowly so that it empowers the Commission to defer to another statutory decision-maker only where the complaint was filed with the Commission before the victim had commenced the other procedure.

Additionally, section 44 provides that the Commission may dismiss complaints for the same reasons.

The *Canada Labour Code* provides that a labour arbitrator who is interpreting a collective agreement is empowered to interpret and apply the Act and to order a remedy under the Act in labour disputes involving employers regulated by the Code, despite provisions in the collective agreements to the contrary. This was based on a recommendation of the Review of Part I of the *Canada Labour Code*, 1995. Many collective agreements now contain anti-discrimination provisions. In this way, discriminatory workplace rules and actions can become the subject of grievance and ultimately arbitration proceedings. The Code also provides for a remedy for individuals who have been unjustly dismissed. An individual may allege that he or she was dismissed for discriminatory reasons.

Public service grievances are dealt with under the *Public Service Staff Relations Act*. The system differs from the one outside the public service. Recently, the Federal Court decided that grievors with a claim that could be advanced under the *Canadian Human Rights Act* must file it with the Commission and not with the Public Service Staff Relations Board because of the wording of the *Public Service Staff Relations Act* which says that a matter cannot be the subject of arbitration if another remedy exists. This seems to us to be anomalous. Employees in the public service should have the same access to anti-discrimination protection under collective agreements as other employees in the federal sector.

Commission staff routinely tell complainants to follow whatever grievance proceedings they have available before proceeding with a complaint.

Consultations and Submissions

We heard considerable concern expressed about this issue in our consultation and submission process. Here are a few examples:

"The complainant must elect a single dispute resolution mechanism. There should be no opportunity to then select another in the event the complainant does not like the result of the initial process chosen. Such selected procedure could include: grievance/arbitration; unjust dismissal and other complaint procedures under Part III of the *Canada Labour Code*; civil action; CHRC; voluntary consensual arbitration arranged between complainant and respondent. [...] The grievance model is best suited to a unionized environment and the Commission's complaints-based model for the non-union sector and for systemic cases." (Federally Regulated Employers — Transportation and Communication [FETCO])

"[...] Grant the Tribunal the explicit power to suspend its proceedings pending the outcome of another process. Once that other process is completed, the Tribunal could determine, based upon a motion by the parties or the Commission, whether its own proceeding should continue. This decision would take into account the remedies granted and the public interest. Issue estoppel would apply to the findings of fact and law of the other body. The advantages of this include elimination of most duplication between forums, while at the same time ensuring that the

public interest is protected and that the complainant's access to appropriate human rights remedies is not foregone." (Canadian Bar Association)

"*The inability of federal public service workers to choose a forum for the relief of human rights disputes is a serious problem for the Alliance.* [...] We recommend that consequential amendments be enacted to the *Public Service Staff Relations Act* which would remove the bar found in section 91(1) of that Act to the pursuit of grievances concerning human rights disputes [...], and would empower adjudicators of the Public Service Staff Relations Board to interpret, apply and give relief in accordance with the provisions of the *Canadian Human Rights Act.* [...] We recommend that section 41(1)(a) (of the CHRA) be amended to allow employees the choice of forum for relief of a human rights complaint, and to codify the principles of *res judicata* and issue estoppel." (Public Service Alliance of Canada)

"In seeking to streamline the activities of the Commission, Parliament should not accept the notion that any person in Canada should be barred from asserting a complaint under the Act because they may have other avenues available for the determination of their rights under the Act. [...] Rules resembling the doctrine of *res judicata* [...] should not be loosely framed in the Act, or used as a bar to the assertion of a human rights allegation not fully heard and determined." (The National Automobile, Aerospace, Transportation and General Workers Union of Canada [CAW-Canada])

The Panel's Views

The Panel considered a number of approaches to the issue of how the Act should deal with the reality that human rights issues may be advanced in a number of different decision-making processes. We fully understand the concerns about the cost and potential confusion that can result from different proceedings involving the same issue. There is a strong point to be made that resource problems are very serious in the human rights process and that multiple proceedings involving the same issue may create an extra burden for the system and those involved in it. At the same time, we believe that there are various features of the human rights process that may balance or outweigh resource concerns. These are the public and quasi-constitutional interest in the advancement of equality, the special role of the Commission in the litigation, the breadth of the remedies under the Act and the expertise of the Tribunal.

We recognize that the Act currently allows the Commission to refer the subject matter of a complaint to grievance or statutory dispute resolution proceedings before it processes it in its own complaint process. This must be based on Parliament's belief that this is an appropriate alternative to the Act. However, this referral power is currently discretionary.

One way of dealing with multiple proceedings is to rely on legal doctrines such as *res judicata* and issue estoppel, which are legal rules meant to prevent a tribunal from re-deciding the same issue placed before it by the same parties or where the earlier decision was final, to prevent re-litigation of the whole case. However, these legal rules already exist and have not reduced the concerns that we heard on this issue. These rules have often not been applied by tribunals and courts because they have found that the human rights legislation has different goals, purposes and remedies from other decision-makers such as labour arbitrators.

Another approach is to offer individuals a choice between procedures, but require them to abide by their choice. We think this might not be fair in many cases. Individuals may not be fully informed about the choice when they make it. They may find themselves before a decision-maker that cannot give as full a remedy as another. They may not be in charge of the proceedings. For example, grievances are in the hands of the union and the union is not bound to act in the public interest as the Commission is when it appears before a Tribunal. If a union does not represent the grievor properly, the grievor may take proceedings before a labour board, but this is time-consuming and costly. The remedies under human rights legislation can be more extensive than grievance awards, though this may no longer be the case where the matter is governed by the *Canada Labour Code.*

A third approach might be to provide that the second decision-maker, whether a labour arbitrator or the Tribunal, must defer to the decision of the first on the human rights issue. If the first decision-maker did not deal with that issue, then the second should. This option is really a variant of the first and has the same disadvantages. We are also concerned about whether the second decision-maker would be qualified to determine whether the human rights issue was dealt with and to decide the issue in its place.

A further way of resolving this issue might be to provide that a single decision-maker would have the power to deal with both matters. This appears to be the intent of the recent amendments to the *Canada Labour Code*. Our concern with this approach is one of institutional expertise. We understand that a great deal of human rights cases are decided by labour arbitrators, and to a lesser extent, decision-makers in other processes. Nothing currently guarantees that the arbitrators have the required training for interpreting the Act. In some cases, some of these arbitrators have been appointed to human rights boards of inquiries and the Tribunal. The system of choosing arbitrators by employers and unions does not guarantee that the public interest in human rights issues will be taken into account in this process. Further, we are again concerned with the fact that the process of resolution of disputes in labour relations are in the hands of the employers and the unions, which leaves the employee who is a victim of discrimination at the mercy of interests of these two other parties, since he or she does not control the process.

The Panel is of the view that the Act must recognize the special expertise and place of the Tribunal as the principal decision-maker in the federal human rights process and as the best source of specialized expertise on human rights issues. We also feel the Act should recognize the specialized purpose of the Tribunal process for resolving human rights disputes.

The Panel is therefore of the view that the Tribunal should have a supervisory role in cases where an individual has more than one avenue for resolving a human rights dispute. However, we want to build into that supervisory role a means of ensuring that resources are not wasted nor confusion caused by the use of two decision-makers when one should be sufficient.

Claimants should try to resolve their cases in the labour-arbitration or other dispute resolution process before going to the Tribunal. This would include the dispute resolution process established as part of the internal responsibility system that we are recommending in chapter five of our Report. This would enable the individual to seek a resolution of the human rights issue through a decision-making process closely connected to the workplace.

We think an individual or organization should always be able to file a claim with the Tribunal. This would put organized workers and other employees with access to other decision-makers, such as an adjudicator in an unjust dismissal complaint (a process available only where a collective agreement does not apply) or another disputes resolution process as part of an internal responsibility system, in basically the same position. All would have access to the Tribunal. The same would be true for those who wished to file a claim about lack of equality in a service.

If an individual or organization wanted to file a claim with the Tribunal before attempting to use another available process, the employer or service provider should be able to apply to the Tribunal to have it defer to the other proceedings, pending the resolution by the arbitrator or other decision-maker. This would require the claimant to use the other process first. In deciding whether to defer, the Tribunal would have to consider whether the human rights claim would likely be resolved by the other decision-making process, whether that procedure was available to the claimant and whether it had the capability to properly decide the issue and provide a remedy to resolve the claim. This would often be a simple decision as the other decision-making processes would become well-known to the Tribunal.

The fact that the capability of the decision-maker is an issue in the question of deferral would provide an incentive for an employer or service provider to ensure that an alternate decision-maker could do this job.

Where the decision was made by the Tribunal to defer to other proceedings first, the claim would be deferred until the result of that procedure was available for a sufficient length of time to permit the other proceedings to be completed.

We would expect that when an individual called the Commission for advice at intake on this issue, the Commission would advise the potential claimant to proceed through the other process first, taking into account the factors in the previous paragraphs. However, the Commission would also advise the individual of the option to go directly to Tribunal.

What happens where a claim was not deferred or after the first decision-maker has made a decision that the claimant does not like? The claimant who did not go through the arbitration or other process first because the other process would not have been capable of deciding the issue and providing a remedy to resolve the claim, or the individual who did but who was not satisfied with the result, would still be entitled to pursue the claim with the Tribunal based on an allegation that the human rights issue in the other process was not identified, heard or decided by the decision-maker. The onus

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would be on the employer or service provider to show that it was. The Tribunal would retain the power to decide that all or part of the claim should proceed through the human rights process. However, the claim would be dismissed if the other procedure fully and fairly dealt with the human rights issues and provided an appropriate remedy.

Our intention here is not to create a right to re-litigate every case, because the human rights process would be engaged only if the original decision-maker failed to deal with the issue of discrimination adequately and completely. This latter finding might not even lead to a reopening of the matter, but rather, it might be more appropriate for the Commission to initiate a new claim or commence an inquiry into the systemic issue depending on the circumstances. The human rights claim should proceed if it were clear that the claimant had not been adequately informed of the choice of the first decision-maker, or was not otherwise fully informed about the choice of decision-maker and remedy.

This approach should act as an incentive for the employer and union involved to ensure that a claimant was fully informed of the choice of decision-maker. It would also be an incentive to ensure that knowledgeable decision-makers were chosen in the case of arbitration, and that all of the discrimination issues, including systemic issues, were fully placed before a decision-maker entitled to decide all the appropriate issues and to provide the appropriate remedies.

There should be a way to identify whether the dispute resolution process of an employer or service provider consistently identifies and resolves a human rights dispute. This could serve to limit the liability of an employer.

We think it would be useful if other decision-making processes were given the power to defer to the Tribunal, should the Tribunal decision be rendered before the other process was engaged. We would insist on the recognition of the Tribunal as the principal decision-maker on human rights issues. That is, an arbitrator should not be able to second-guess the Tribunal on a human rights claim.

We also think the Tribunal should report on the number of claims it has deferred while waiting for the case to go through another process and the number of claims that it has dismissed after going through another procedure. The Tribunal or the Commission should carry out research on the capacity of other decision-makers to decide human rights cases and make this information public, either in its Annual Report or in other forms. This would assist in the five-year review we are proposing, in seeing how changes to the process are working.

Recommendations:

100. We recommend that the Act provide that the Tribunal defer a claim filed with it until the human rights issue in dispute is resolved in another dispute resolution process where another process is available and able to resolve the human rights dispute and can provide an appropriate and adequate remedy. Otherwise, claims should proceed without delay.

101. We recommend that the Act provide that the Tribunal may dismiss a case that has been the subject of another competent dispute resolution proceeding that has fully dealt with and has provided an adequate remedy on the human rights issues raised by the case. The Tribunal should report on the number of claims that it has deferred and dismissed and on research concerning the capacity of other decision-makers to decide human rights cases.

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CHAPTER 14
Who May File a Claim?

Issue

The Panel considered the issue of whether the Act is clear enough about who may file a complaint of discrimination. With direct access to the Tribunal and without the Commission to manage the early part of the process, it will be necessary to ensure that the rules about who can file a claim are clear.

The Act has rules about who may file a complaint based on whether or not the alleged discriminatory act took place inside or outside Canada and whether the person is a citizen or permanent resident. These rules create separate issues that are dealt with in Part Four on the Scope of the Act. The present chapter deals with:

- the power to file claims on behalf of other individuals or groups of individuals who are identified in the claim;
- the power of the Commission to initiate claims;
- the power to file claims in a representative capacity.

This chapter should be read in parallel with the chapter on "Who is a Person Affected by a Breach of the Act" in Part Four of our Report.

Current Legislation

The Act provides that an individual or group of individuals having reasonable grounds to believe that someone has engaged in a discriminatory act may file a complaint with the Commission. It also provides that the Commission itself may initiate a complaint where it has such reasonable grounds. The Commission has not done this very often.

There is an issue of whether the person who files a complaint has to identify a "victim" of the discrimination. Section 40(5)(b) of the Act currently allows complaints to be filed about discriminatory employment application forms and advertisements (s. 8), employment policies, practices and agreements (s. 10), discriminatory signs and symbols (s. 12), and hate messages (s. 13) where no victim can be identified. It also provides that complaints can be made about discrimination in services without having to identify a particular victim (s. 5). However, the Act requires that it must be possible to identify a victim with respect to complaints of discrimination against a specific employee (s. 7), or union member by a union (s. 9), or a complaint of unequal pay (s. 11), harassment (s. 14) or retaliation (s. 14.1).

A second issue concerns who is allowed to file a complaint. Obviously, the victim of a discriminatory act is able to file a complaint. This is the usual case. Further, the Act deals with the situation where a complainant may file a complaint on behalf of the actual victim of the discrimination. The Act provides that the Commission may, in its discretion, refuse to deal with the complaint without the consent of the victim. This recognizes the privacy of a victim who may not wish to be involved in any further proceedings about a traumatic event. It has the additional purpose of ensuring that the complainant has a serious interest in coming forward. It also provides a means for dealing with a situation where the victim is unable to file a complaint and must have another person file it on her or his behalf.

The Commission currently accepts complaints filed by unions on behalf of their membership and complaints filed by equality seeking groups on behalf of the class of individuals the community group represents.

The issue of the status of unions as complainants was considered recently in the 1998 Federal Court of Appeal decision in *Communications, Energy and Paperworkers Union of Canada et al. v. Bell Canada*. The Court considered the issue of whether the unions, as representatives of the victims of the discrimination alleged in the complaint form, had to prove they had the consent of all of their members who were victims. The Court noted that the practice of the Commission of accepting complaints filed by unions on behalf of their members as a complaint filed by a "group of individuals" was not questioned. It also noted that the status of a complaint filed by "a group of individuals" known as "Femmes-Action" was not questioned either. The Court found that the Commission had decided not to require proof of the consent of the members and it had not been suggested that this was unreasonable. Further, the history of the complaint showed that the alleged victims had endorsed the actions of the union throughout. Even though this appears to have been accepted by the Court in that case, we think it would be appropriate to clarify some of these rules.

The Panel's Views

(i) Claims where There is an Individual Who Has been the Victim of the Alleged Breach of the Act

In the Panel's view, individuals and group of individuals should continue to be able to file claims where they are the victims of an alleged discriminatory practice.

An individual or group of individuals should also be able to file a claim alleging a breach of the Act on behalf of an individual victim or victims actually named in the claim form. However, the Panel is of the view that the consent of the victim should be proved to the Tribunal, unless the victim is incapable of giving consent, for example for reasons of a disability. A Tribunal should not have to decide whether an individual victim's consent should be waived where the claimant does not want to bring the claim personally.

(ii) Commission-Initiated Claims

We think it is important to retain the provision enabling the Commission to initiate claims.

The Commission has this power now, but has rarely used it. We understand that this provision puts the Commission in the difficult position of being the complainant, the investigator, conciliator and decision-maker all at the same time in complaints. One of the purposes of the direct access process is to allow the Commission to concentrate its efforts on those cases that will have the greatest impact. The new process also would end the conflict of roles which we understand inhibited the use of this power in the past.

The Commission would remain the central enforcement agency under the Act. It would still have considerable expertise on the issue of equality. We are recommending powers that would make it even more informed about trends in equality. This, plus the greater control over its litigation, would mean that it would be able to choose wisely when to initiate a claim. The Commission should continue to have a tool to engage the claims process itself when the need arises to ensure the advancement of its purposes. It should not have to wait for someone else to bring a claim. We think therefore that there is a strong reason for ensuring that the Commission retains the power to initiate a claim itself.

(iii) Representative Claims

The Panel thinks it is important for an individual, group of individuals, or an organization to be able to bring a claim on behalf of individuals not actually named in the claim form. This is especially so in cases involving systemic discrimination. Such cases can affect large numbers of people and serve the purpose of preventing future discrimination against as yet unknown people.

We think it would be useful to clarify the rules about representative claims. The Act does not make this concept clear as can be seen in the *Bell Canada* case mentioned earlier. In the past, the Commission took control of a complaint after it was filed and could take the steps necessary to guide the complaint through the system in a way that the parties knew who was involved. Because it was carrying out an investigation and in contact with the parties, the Commission was also in a position to know whether the consent of the victim was needed in order to use its discretion. In the direct access process, the Tribunal would benefit from clearer rules about who is affected by the claim.

We think it is important for the Tribunal to decide a case on the basis of the facts before it. It should not be put in the position of making a decision based on hypothetical facts. Parliament has already indicated its view that it is possible for the Tribunal to decide a case where there is no identifiable victim by creating the rules for such cases as described earlier. However, a case where no victim can be identified does not mean that the case is hypothetical. Such cases would rise from practices that would undoubtedly lead to victims as a natural consequence. For example, an individual could file a complaint under the current Act alleging that a term of a collective agreement was discriminatory. The complaint would not have to say that a particular individual was the victim of the application of that term. In this sense, this type of proceeding would have a preventative purpose and be similar to public interest litigation.

Representative actions save time, resources and the possibility of multiple proceedings over the same matter with multiple decisions. However, there should be safeguards to ensure that all interested persons understand how the representative claim process works.

The Panel is not in a position to state all of the elements that should be in a representative procedure, but we think it should be as fair and simple as possible for all parties. The following elements should be present:

- the claimant should be capable of representing the individuals on whose behalf the claim is being made (often the case where an organization is acting in the name of its members);

- all of the individuals represented should be identifiable where a remedy for a specific group of individuals is being sought, but need not be named for the claim to proceed, nor is their consent required;
- the issues in a claim should be the same for all the individuals in the class represented;
- the issues should not be hypothetical;
- the Tribunal should have the power to dismiss a case that is too amorphous to be litigated or that is not truly representative;
- all members of the class should be identifiable if the claim includes a request for an individual remedy on behalf of all members of the class in the claim.

The rules should deal with matters such as notice to the members of the class, settlement, discontinuance, amendment to the group of individuals represented, and the assessment and distribution of damages to members of the represented group. These rules should be developed in consultation with individuals and organizations appearing before the Tribunal. They should be as simple as the rules of natural justice allow, in order to ensure that the Tribunal system is as accessible as possible.

Provisions of the Act That Currently Require an Identifiable Victim

As noted earlier, there are some provisions of the Act for which a complainant must be able to identify a victim, that is, someone who actually suffered the prohibited harm. These include allegations of discrimination in employment, except where the discrimination is found in an agreement or policy, allegations of discrimination in treatment by a union, and equal pay, harassment and retaliation complaints.

There is no need to retain the provision requiring that a victim be identified for a complaint to be valid. The distinction between discrimination in employment and discrimination in employment policy and agreements has been removed by the Supreme Court of Canada's elimination of the distinction between direct and adverse effect discrimination. It no longer makes any difference whether the action complained of was aimed at someone because of their personal characteristics (direct discrimination) or whether it simply had an adverse but unintended effect on them because of those same characteristics. The same is true of allegations of discrimination against unions. Equal pay is not part of this study. There is no need to specifically require an identifiable victim for an harassment or retaliation claim because the act involved would not exist without a victim.

We should add that this is a separate issue from the procedural question that arises when a remedy is sought from a respondent for a specific group of individuals. These individuals should be capable of being identified. However, there would be no need to name a specific victim where all that was being sought by way of remedy was the end of a discriminatory policy.

Recommendations:

102. We recommend that individuals and groups of individuals be able to file claims where they are the victims of an alleged breach of the Act. We also recommend that an individual or group of individuals be able to file a claim alleging a breach of the Act on behalf of an individual victim or victims. However, the consent of the victim should be proved to the Tribunal, unless the victim is incapable of giving consent, for example for reasons of a disability.

103. We recommend that the Act retain the provision enabling the Commission to initiate claims.

104. We recommend that the Act provide that an individual, group of individuals, or an organization be able to bring a claim on behalf of individuals not actually named in the claim form. We recommend that the Rules clarify how representative claims work and that the Rules be as fair and simple as possible.

105. We recommend that there be no requirement for identifiable victims in the Act in order to have a valid claim, as is required by section 40(5)(b) of the current Act.

- all of the individuals represented should be identifiable where a remedy for a specific group of individuals is being sought, but need not be named for the claim to proceed, nor is their consent required;
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PART THREE: ROLES AND INDEPENDENCE

CHAPTER 15

The Structure of and Appointments to The Canadian Human Rights Commission, Advisory Council and Tribunal

(a) Structure

Issue

We considered whether the current Commission's structure is appropriate in light of the recommendations we are making to change the process. The modified Commission we propose would retain some of its current duties and functions, but these must be altered somewhat to suit the new mechanisms and the new emphasis given to some of the functions.

The Present Structure of the Commission

The Commission as established by the Act consists of a Chief Commissioner, a Deputy Chief Commissioner and from three to six other members. All are appointed by the Governor in Council (Cabinet). The Act provides that only the Chief and Deputy are full-time members. The other Commissioners may be appointed on either a full or part-time basis. In practice, the Chief and Deputy Chief are full-time appointments and all other Commissioners serve as part-time members. The Deputy Chief position has been vacant since 1997.

There are a number of provisions in the Act to ensure the independence of the Commission. Each full-time member may be appointed for seven years and each part-time member for up to three years, subject to re-appointment. The salaries of full-time Commissioners are set by the Governor in Council (Cabinet), while those of part-time members are set by the Commission in its by-laws to cover compensation for meetings where their attendance is requested by the Chief Commissioner, for their regular duties and for any additional duties approved by the Chief Commissioner. The Commissioners hold office "during good behaviour" but may be removed by the Governor in Council "on address of the Senate and House of Commons." The June, 1998 amendments to the Act provided that the Annual and Special Reports of the Commission are submitted directly to Parliament, rather than to the Minister of Justice as before.

The Chief Commissioner is the Chief Executive Officer of the Commission and is required to supervise and direct the Commission and its staff and to preside over Commission meetings. If the Chief Commissioner is absent or incapable of performing the duties of the position, or the post is vacant, then the Deputy performs them.

The head office of the Commission must be in the National Capital Region, but the Act provides that the Commission may establish up to 12 regional offices. The Chief Commissioner decides when and where meetings of the Commission are held.

The Chief Commissioner is empowered to establish "divisions" of the Commission that can exercise the powers the Commission decides to delegate to them.

The Commission can make by-laws governing its affairs. A "division" of the Commission cannot make by-laws by itself.

The full-time members of the Commission are deemed to be persons employed in the Public Service for pension purposes. Commission employees are appointed in accordance with the *Public Service Employment Act*, which is meant to ensure, among other things, that the merit principle is the basis for hiring.

The Commission is charged with the administration of the Act, the complaint mechanism and is given broad and detailed powers relating to the promotion of the principles in the Act. These include:

- developing public understanding of the Act and its principles;
- sponsoring research;
- maintaining liaison with provincial commissions to foster common policies and to avoid conflicts in handling complaints in cases of overlapping jurisdictions;
- performing functions that it agrees to carry out with provincial commissions;
- considering recommendations, suggestions and requests concerning human rights received from any source and commenting on them in a report to Parliament if appropriate;
- carrying out studies on human rights as referred by the Minister of Justice and reporting its recommendations to Parliament;

- reviewing regulations, rules, orders, by-laws and other instruments made under another Act of Parliament and reporting to Parliament on inconsistencies with the Act;
- discouraging discriminatory acts by publicity or other appropriate means consistent with its role in processing complaints;
- making guidelines that bind itself and the Tribunal;
- initiating complaints;
- approving accessibility plans for people with disabilities;
- providing advice on affirmative action plans;
- appearing as a party before the Tribunal in the public interest;
- reporting to Parliament annually and when necessary on special matters such as inconsistencies between the Act and pension plans established by statute before the Act came into force in March, 1978.

The Commission may also share its duties with other organizations in certain situations. On the recommendation of the Commission, the Governor in Council may assign Commission functions with respect to employment outside the Public Service to officials with the Department of Human Resources Development. Subject to approval of the Governor in Council, the Commission is empowered to enter into agreements with provincial human rights commissions either to carry out some of their duties or to have them carry out some of the Commission's duties. The Governor in Council (Cabinet) may make regulations giving the Commission more powers and duties under the Act.

The Commission also has certain responsibilities under the *Employment Equity Act* (EEA). The staff of the Commission conduct audits of employers covered by the EEA. If the audit reveals that the employer has not fulfilled its EEA obligations, the Commission officer attempts to negotiate a written undertaking from the employer to take steps to remedy non-compliance. If that is not possible, the Commission can give a direction to the employer to take steps to comply and, if other measures fail, can ask for a hearing before an Employment Equity Review Tribunal.

The Commissioners and staff are required to comply with security and confidentiality requirements for the information they receive about investigations and other matters.

Proposed Functions for a New Commission

The Panel is of the view that the structure of the new Commission must be determined by the core functions it would require under our proposed new approach.

These would be:

- providing overall administration of the CHRA;
- deciding when the Commission would be a party to claims brought to the Tribunal using the new direct access model based on criteria established in the Act and supplemented by the Commission from time to time;
- acting as a party to the claims that the Commission decides to join in, using its own legal resources to develop the evidence and representations necessary to support a claim;
- deciding when to initiate a claim itself and to carry that claim forward through the Tribunal system;
- monitoring the enforcement of Tribunal orders;
- preparing and submitting Annual and Special Reports, including Reports containing the Commission's opinion on Canada's compliance with its international equality obligations;
- initiating inquiries and making recommendations;
- preparing policies, guidelines and carrying out rule-making activity;
- designing and carrying out educational and research programs;
- carrying out international activities;
- enforcing the *Employment Equity Act*;
- providing appropriate leadership in human rights in Canada, and coordinating activities with provincial commissions and non-governmental organizations concerned with human rights, that would promote the value of equality in Canada.

A New Structure for the Commission

We considered a number of options for the structure of a new Commission that could provide these functions.

(i) Full-Time and Part-Time Commissioners

As described earlier, the current structure in practice includes one full-time Commissioner and several part-time commissioners. They meet several times a year to make decisions about individual complaints and to provide policy direction. This structure permits regional representation through the part-time commission members but it does not permit any input by non-governmental organizations. Part-time members may

feel that they do not have enough access to resources to be effective Commissioners.

(ii) Organizing by Function

One option is a Commission composed of five full-time Commissioners, with each Commissioner assigned a specific function or functions and each Commissioner required by the Act to report separately on the performance of each function in the Annual Report of the Commission. The purpose would be to ensure that all of the functions are assigned and carried out by Commissioners specifically responsible for them. This structure would increase the Commission's responsiveness to community organizations and employers, employee organizations and service providers. An increase in the number of Commissioners for this purpose would make the organization more costly and less efficient. These factors suggest a smaller Commission, with an appropriate consultative body.

(iii) Three Full-Time Commissioners

Another option would be three full-time Commissioners, together with an Advisory Council that would meet with the Commissioners a number of times each year and advise the Commissioners on policy and objectives. This is the option we recommend. The Commissioners would make the decisions for each of the Commission's functions, including general Commission policy and enforcement policy, including the claims the Commission should join or initiate and which inquiries to hold. This option would overcome the rigidity of a functionally based Commission described in the second option and offer savings in resources and the increased efficiency of a small, full-time body.

An Advisory Council

We heard in our consultations that many groups were frustrated with the current system that does not permit access between the Commission and non-governmental organizations. Some groups felt that the Commission was indifferent and out of touch with their needs. This sentiment was expressed by all sectors from employers to equality-seeking groups.

It is important to build a strong permanent link between the Commission and the various communities it serves in the course of the administration of the Act. A Council could make the Commission's work more transparent and more accessible to non-governmental organizations and provide information to the public about the Commission's work. One possible option is the establishment of an Advisory Council. The purpose of the Council would be to give its own independent advice on matters of significance to the Commissioners within their mandate.

The Advisory Council would meet with the Commission a few times each year at a time and place specified by the President. However, the Act should require that the Commission meet with the Council at least twice each year. New technology would allow the Council to be consulted more frequently, though face to face meetings would also be needed.

The Advisory Council would be composed of about twelve members. The Council would provide representation for the regions of Canada and include individuals from organizations that are directly affected by the Act, including employers and service providers, labour and the non-governmental sector. The Advisory Council would be composed of members that have expertise in human rights issues and reflect the diversity of the Canadian population including a gender balance. Members of the Council would not represent their respective organizations since this would probably reduce their ability to give advice on a timely and flexible basis to the Commission. The President of the Advisory Council would be selected by members of the Council.

The Council's main focus would be Commission policy and rule-making matters, criteria for the selection of cases for the Commission to join (in addition to the ones specified in the Act), the objectives for Commission enforcement policy and the kinds of inquiries it should undertake. The Council could provide advice on how the Commission might carry out broader consultations on issues requiring more input from interested parties. It should be given statutory authority to report on its duties in the Annual Report. This would ensure that the Commission listened to the Council's advice and that they maintained a close working relationship.

The Council would provide the new system with a degree of transparency and accountability it might otherwise lack with only a few full-time Commissioners. The Council would provide a measure of regional and interest representation in the views it expressed to the Commission. Its meetings would not likely create a major expense, though some administrative support would have to be provided by Commission officials. Council members would get a daily rate of remuneration and have their expenses paid for by the Commission.

M121

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The Council would not have a separate budget, but would be funded by the Commission since we are not proposing the creation of a body completely independent of the Commission, but rather one that would assist the Commission in carrying out the tasks that require consultation with interested organizations.

The Council members would be expected to maintain contact with their organizations to ensure advice to the Commission was based on the current views of these organizations.

The performance of the Council should be examined in the five-year review of the Act.

Regional Offices

The Commission should continue to have regional offices in order to provide an established regional presence, even though it may be impossible to have an office in every major city in Canada.

The Commission could set up regional offices on a cost-shared basis with provincial commissions. It would be very useful to have representatives of both federal and provincial commissions in one place to provide seamless service to those who have a claim but who might not know whether the claim should be filed federally or provincially. The regional offices are a way of carrying out the provision of advice concerning the initial inquiry as well as providing education and information about human rights issues in general. This should be continued and strengthened.

Recommendations:

106. We recommend that the Act create a Commission with three members appointed on a full-time basis. The Commission would be headed by a President who would act as the Chief Executive Officer of the Commission. The Commissioners would carry out the functions of the Commission with the assistance of a sufficient number of officials. The Commissioners would collectively be responsible for the work of the Commission and would report on each of the Commission's major functions including litigation, employment equity responsibilities, policy and rule-making, inquiries, education and promotion in its Annual Report to Parliament.

107. We recommend that the Act establish an Advisory Council consisting of twelve members drawn from employers and service providers, employee organizations and equality seeking groups who reflect the diversity of the Canadian population, including a gender balance. The Act should require that the Commission consult the Council on such issues as Commission policy and rule-making, objectives for the kinds of cases that the Commission should join as a party before the Tribunal and the kinds of inquiries that the Commission should commence and how it should proceed with matters that require even broader consultation. The Advisory Council members would be expected to keep in contact with the groups with which they have been associated in order to provide the most current advice to the Commission on the viewpoints of the various non-governmental organizations.

108. We recommend that the functioning of the Advisory Council be reviewed in the five year review of the Act.

109. We recommend that the Act require that the Commission maintain regional offices.

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(b) Appointments

Issue

In order to carry out the purpose of the Act efficiently and effectively, the people appointed to the Commission, the Tribunal and the Advisory Council should be qualified for the work. We considered what the qualifications should be for these appointments, bearing in mind that the Act was recently amended establishing qualifications for Tribunal members.

The Act

Section 26 of the Act provides that the Governor in Council (Cabinet) appoints the Chief Commissioner, Deputy Chief Commissioner and part-time Commissioners. The Act states that they can be re-appointed in the same or another capacity. The Act does not provide a list of qualifications for the appointment of Commissioners.

Section 48.1 of the Act establishes the Canadian Human Rights Tribunal, consisting of a maximum of 15 members including the Chairperson and Vice-chairperson. The Act provides that the Chair and Vice-chair must be members in good standing of a bar with at least ten years experience. Tribunal appointments must be made having regard to regional representation and to the following criteria: experience, expertise and interest in, and sensitivity to, human rights.

There is no Advisory Council in the Act, but in practice, the Commissioners other than the Chief and Deputy Commissioner, are appointed on a part-time basis bearing in mind the concerns of geographic and group representation.

The Current Appointment Process

The Commissioners and Tribunal members are appointed by the Governor General on the advice of Cabinet. Generally, notices of vacancy of Governor in Council appointments are published in the Canada Gazette. Before the appointments are finalized, the President of the Tribunal or the Chief Commissioner of the Commission are usually consulted on the appointment.

Consultations and Submissions

Many organizations expressed concern about the transparency of the current appointment process. One suggested that a multi-party committee should be created to review qualifications and experience of appointees. Some groups expressed concern with "political" appointments. Most would support a more open and transparent process for selecting Commissioners and Tribunal members.

Many organizations said that diversity should be a factor in the appointments made to these bodies. Labour organizations spoke of a need to understand the reality of the workplace and the perspectives of employees.

The Panel believes it is more important to set the qualifications for appointments in the Act than to change the process of appointment itself. However, a more transparent appointment process with greater public awareness of positions available would help to restore confidence in the federal human rights system.

The Commission and Advisory Council

We think the Act should require Commissioners and Advisory Council members to have similar qualifications to those established for Tribunal members by the last set of amendments to the Act in June of 1998. This is important because it ensures that the Governor in Council considers these requirements when Commissioners and Advisory Council members are chosen.

The Commissioners and Advisory Council members should therefore have "experience, expertise and interest in, and sensitivity to human rights." Additionally, the Act should provide that they should have the necessary management, administrative skill and experience to carry out their tasks. As stated earlier, these bodies should be representative of the various regions of Canada and reflect the diversity of the Canadian population, including a gender balance.

Commission members would be appointed for a term of seven years. This provides them with sufficient security of tenure to be able to act independently of the government and time to develop the experience and to use it to give the Commission continuity in its goals and methods. Appointments should be staggered to ensure further continuity.

Members of the Advisory Council would be appointed for a term of three years. This would ensure enough time for the Council to develop their own way of doing things, but at the same time ensure some turnover so that the advice the Commission receives would be renewed at regular and not too lengthy intervals.

The Tribunal

The Panel's view is that the qualifications for Tribunal members should remain the same, but with the addition of the knowledge of evidence and procedural matters

that would ensure that they are appointed with the necessary skills and experience for conducting hearings and managing the Tribunal's caseload.

Tribunal members should be members of one of the Bars or the Chamber of Notaries in Québec. We think that the concern about ensuring greater variety of experience on the Tribunal is outweighed by the need to streamline the Tribunal structure by using single members to hear most cases. To conduct a hearing, a member must be able to make determinations on points of evidence and procedure in the new process. However, an appropriate selection process should make it possible for members of the Tribunal to have both the required qualifications and also to reflect the diversity of the community.

It is the Panel's view Tribunal members all need the security of a seven year term. With the direct access approach, their output will increase and they will need the security of knowing that their decisions can be made independently.

The Panel also believes that the new direct access system should only require the same number of Tribunal members as is required under the existing Act. However more members will need to be appointed on a full-time basis. (This number is based on the number of complaints the Commission received in 1998/1999.) It might be useful to remove the cap of fifteen Tribunal members to ensure that the government has the flexibility to appoint enough members to handle the workload.

Recommendations:

110. We recommend that the Act should require that Commissioners have "experience, expertise and interest in, and sensitivity to human rights." Additionally, the Act should provide that they have the necessary management, administrative skill and experience to carry out their tasks. Commissioners should be selected based on the following criteria: regional representation; reflect the diversity of the Canadian population; ensure a gender balance.

111. We recommend that the Minister consider a more transparent process for the appointment process including a greater public awareness of the positions available.

112. We recommend that Commission members be appointed to serve on a full-time basis for a term of seven years.

113. We recommend that members of the Advisory Council have "experience, expertise and interest in, and sensitivity to human rights." Advisory Council members should be selected based on the following criteria: regional representation; reflect the diversity of the Canadian population; ensure a gender balance; and should include individuals from different sectors directly affected by the Act.

114. We recommend that members of the Council should be appointed for a term of three years and the renewal of members should be staggered in order to permit continuity on the Advisory Council.

115. We recommend that the requirements for Tribunal members be the same as the Act currently requires with the addition of the following criteria: regional representation; reflect the diversity of the Canadian population; ensure a gender balance. In addition Tribunal members should have knowledge of evidence and procedural matters that would ensure that they are appointed with the necessary skills and experience for conducting hearings and managing the Tribunal's caseload. The size of the Tribunal caseload, the fact that hearings should normally be held by one member and the greater amount of procedural work that members will have to do under the new direct access system requires that all members be members of the Bar or the Chamber of Notaries of Québec.

116. We recommend that the term of a member of the Tribunal should be seven years, with whatever time is necessary to be able to complete the hearings underway at the end of the seven year period and the government should be able to appoint the number of members necessary to handle the caseload created by the direct access model in a timely way.

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CHAPTER 16
The Commission's Reporting Function

Issue

One of the principal ways for the Commission to communicate its views to the Canadian public is through its Annual and Special Reports to Parliament. We considered what other reporting arrangements might be appropriate given the modifications we have recommended to the Act.

The Act

The Act was amended in June, 1998 to provide in section 61 that the Commission submit to Parliament its Annual Report and any other Special Report within its authority. This provision enhanced the independence of the Commission. Prior to 1998, the Commission provided its Reports to the Minister of Justice who then tabled them in each House of Parliament.

The Annual Report discusses the activities of the Commission, including the complaint process, as well as the promotional, research, rule-making and administrative activities of the Commission. The Commission may include in its Reports specific matters such as comments on provisions of federal public pension statutes that are inconsistent with the Act.

The Commission's power to make Special Reports to Parliament allows it to comment on any matter within its scope, if the Commission thinks that the matter is too urgent to wait for the next Annual Report.

The Tribunal as well is required to submit an Annual Report to Parliament on its activities under the Act.

The Reports are provided to Parliament through the Speakers of the Senate and the House of Commons.

The 1998 Auditor General's Report on the Commission recommended that the Commission's reporting on performance be improved through the provision of information on the delivery of services against defined standards.

The Panel's Views

A number of the recommendations we have made elsewhere in this Report will have an effect on the content of the Commission's Reports. The Annual Reports should provide a global review of the Commission's work. It should be a broad functional report. Each function should be linked with qualitative information that evaluates the effectiveness of achieving the purposes of the Act and be used to develop policy direction and the proper priorities for the enforcement activity. Reporting also serves a strong educational purpose. But more importantly it can lead to a better integration between a specific Commission function and the monitoring of that function.

In chapter three we recommended that the preamble refer to Canada's international human rights obligations. Consistent with this, the Commission will have to add to its Annual Report or in a Special Report its comments on Canada's compliance with its international obligations. The Commission in reporting on this function may wish to consult with the non-governmental sector and other commissions in preparing comments on our international obligations.

Moreover, most of the reporting to date has focused on quantitative information, such as the number of inquiries received from the public or the number of complaints filed and processed in a year. However, the quantitative information should be supplemented by a more qualitative approach. We have recommended a number of new tools to assist in the advancement of equality. We would like the Annual Report to include a section on the effect of the Act on the lives of Canadians. The Commission should, in addition to reporting on the number of claims processed, the number of seminars given and other specific items, place more emphasis on broader questions such as "Are we achieving substantive equality in Canada?", "What systemic barriers have been eliminated?", "How is the Commission making a difference in the lives of Canadians?"

To do this, the Commission will have to develop standards for assessing these kinds of questions. Evaluation instruments are not easy to develop, but indicators are being developed by Status of Women Canada that analyse economic gender equality and overall gender equality. The United Nations Development Programme (UNDP) has suggested that the Human Development Index be refined to focus on how people are faring, rather than how much nations are producing.

We did not consider in any detail what human rights indicators should look like. This is something the Commission will have to develop itself. The Commission could with the cooperation of employers,

service providers and unions, survey workplaces to determine the state of equality. For example, in 1983 the Commission conducted a survey on sexual harassment in the workplace. Other surveys the Commission could consider might look at the degree of accommodation for employees' religious needs, needs related to disabilities and needs related to family responsibilities. The Commission could conduct a survey of employment equity groups, employer and labour organizations to assess the effectiveness of the new direct access model. The Commission could report its findings in the next year, focus its policy and educational priorities accordingly for the following five years, after which it could re-test the workplace to see whether or not the lives and working conditions of employees had improved.

The same approach could be used for service providers. For example, the Commission could carry out surveys of consumers of services in both the private and public sectors. This could be based on work done by the United Nations Development Programme, as reported in its 1996 *Report on Evaluation Findings*. In evaluating the performance of various organizations, the UNDP developed indicators based on efficiency, speed, excellence, appropriateness, timeliness, responsiveness to the needs of beneficiaries and situations, amongst others. Similar indicators could be used to assess services. Over time, the surveys could reveal essential facts on the status of human rights in service delivery under federal jurisdiction and highlight for the Commission priority areas of particular concern. A similar review could be conducted after four or five years to assess whether there was any improvement and whether specific groups of people were being served without an infringement of their human rights.

The Commission could also use the internal responsibility systems that we are recommending to assist in collecting and providing information about the experiences of employees in federal workplaces. The inquiry power may be useful in assessing the state of systemic discrimination in the federal sector. The Commission may also wish to continue its current practice of commissioning independent research on important human rights issues and using information from employment equity audits.

A qualitative approach based on human rights indicators could:

- enable the Commission to monitor and carry out long-range planning for better implementation, enforcement and compliance of human rights principles in a non-litigious manner (for example, whether members of visible minorities are receiving equal treatment in federal workplaces);
- increase the Commission's collective awareness and responsibility for the advancement of equality;
- help the Commission set priorities;
- help the Commission manage its public policy agenda and focus attention, resources and education in areas that remain underdeveloped and troublesome in the area of human rights;
- assist a reinforced educational function (for example, by enabling the Commission to know which barriers are being dismantled, which ones are being created, and how this impacts on the disabled community);
- help the Commission focus on the need to enforce remedies;
- better empower the Commission to tackle systemic discrimination under the new direct access model, focusing the Commission's role on larger groups and broader issues;
- facilitate the Commission's decision-making process in choosing cases to carry in a direct access model;
- increase the Commission's own accountability and render it more efficient;
- increase the Commission's expertise on broader equality issues and thus its credibility; and
- respond to the Auditor General of Canada's recommendations.

Recommendations:

117. We recommend that the Commission be required to report on each of its major functions, including litigation, employment equity responsibilities, policy and rule-making, inquiries and education and promotion, in its Annual Report.

118. We recommend that the Advisory Council be provided with its own section of the Annual Report to comment on policy issues and other aspects of the Commission's functions.

PART FOUR: SCOPE OF THE ACT

CHAPTER 17
Grounds

(a) Genetic Discrimination

Issues

We were asked to determine whether the Act should be amended to prohibit discrimination based on the results of genetic testing. Genetic testing may show individuals carry a gene putting them at greater risk of contracting a particular disease. They may have a predisposition to the disease, but not necessarily ever develop it. This raises the issue of whether the Act should prohibit distinctions in employment and services based on the predisposition to a disability. It also raises the related question of whether discrimination based on a perception of disability should be prohibited.

Legal Environment

The Act prohibits discrimination on the ground of disability. Section 25 defines disability as meaning "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."

The Tribunal has held that acting on the perception that an individual is disabled is tantamount to acting on the reality of a disability. In *Brideau v. Air Canada* (1983), the Tribunal held that the refusal to hire the complainant because he was perceived to have air bubbles in his lungs was discriminatory on the basis of physical disability, even though the condition did not exist. To discriminate against someone because he or she is perceived to be disabled has the same effect as if he or she were disabled.

The definition of "handicap" in the *Ontario Human Rights Code* includes the belief that an individual has a "handicap."

Discussion

Senator Sheila Finestone submitted that some predict genetic discrimination could become *the* human rights issue of the new millennium. She stated that individuals with genetic disorders could become socially stigmatized and might even create a "biological underclass" of people whose genes brand them as poor risks for purposes of insurance, employment, and the provision of goods and services.

The Council of Canadians with Disabilities urged the addition of perceived disability to the definition of disability in the Act to make the law clearer. The Council also noted that greater sophistication in genetic screening may lead employers and service providers to conclude that a person is predisposed to becoming disabled. They recommended as well the addition of "being predisposed to having a disability in the future" to the definition of disability.

The Panel's view is that the technology of genetic testing and analysis raises a great number of issues. These include privacy concerns about the use of the results of genetic testing. All these issues seriously affect personal autonomy and privacy. However, we recognize that the Act can only deal with issues related to discrimination and human rights.

Genetic screening could reveal a genetic disorder or a predisposition to a disease that might lead an employer or service provider to refuse a job or a service. This type of genetic information might also lead to the denial of benefits such as group insurance coverage. A genetic disorder that has actually resulted in a disability would come within the purview of disability as defined by the Act.

The law is less clear about test results that show a predisposition to a disability, especially when the disability has not and may never become apparent. Though this concern especially arises with genetic analysis, it is also true of other conditions. For example, a person may be HIV positive, yet not have any symptoms of AIDS. It could be the same for multiple sclerosis. Treating a person who does not have any symptoms of disability as though he or she does should be forbidden by law just as discrimination against disabled people is. The employer or service provider should be called on to prove justification, the *bona fide* occupational requirement for employment and the *bona fide* justification for services.

Recommendation:

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The Commission could also use the internal responsibility systems that we are recommending to assist in collecting and providing information about the experiences of employees in federal workplaces. The inquiry power may be useful in assessing the state of systemic discrimination in the federal sector. The Commission may also wish to continue its current practice of commissioning independent research on important human rights issues and using information from employment equity audits.

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Recommendation:

119. We recommend the definition of "disability" in the Act should include the predisposition to being disabled.

(b) Political Belief

Issue

We were asked to consider whether the Act should be amended to prohibit discrimination on the ground of political belief or opinion.

The Act

The Act currently does not prohibit discrimination on this ground. However, it does cover discrimination based on religious belief which in some respects is similar to this ground.

Seven provinces and one territory prohibit discrimination on this ground in their human rights legislation. However, with the exception of P.E.I., the ground has resulted in very few complaints. For example, the latest annual report of the B.C. Human Rights Commission shows that this was the least used of all the grounds. A large percentage of the P.E.I. cases concern allegations arising from complaints related to patronage in which the complainants have lost government employment or contracts after a change in government. Most reported cases in Canada have dealt with individuals who lost jobs when the political party they supported lost an election. The *United Nations Universal Declaration of Human Rights* provides that everyone is entitled to the rights set out in the *Declaration* without distinction based on, among other grounds, political or other opinion.

Consultations and Submissions

Several submissions during our consultations supported the addition of this ground. However, others suggested caution. For example, one organization noted that a careful definition would be required. Government departments said that consideration of political belief was sometimes legitimate, for example, in cases of national security. Concern was also expressed that the addition of this ground might protect those who disseminate hate propaganda.

The Panel's Views

We have concluded that it is not necessary to add this ground at this time, but we think that the Commission should monitor the situation. Our consultations did not reveal that there was widespread discrimination on this ground on a national scale. In comparison with other grounds, there have been few human rights cases on this ground.

In other chapters of this report, we have noted the importance of focusing more attention on eliminating systemic discrimination and broad patterns of disadvantage and powerlessness. Our research and consultations have revealed no evidence that there is widespread systemic discrimination on the ground of political belief or that this ground is related to patterns of persistent disadvantage.

Many of the cases that have been decided in the past have related to the issue of political patronage. While the existence of patronage is a legitimate concern, human rights legislation is not the best vehicle to deal with this issue. At least to some extent, many of the patronage cases concern the termination of special advantages that a person has previously enjoyed because of association with the party formerly in power, not that person's ongoing inequality. We also note that the Charter may provide another source of protection against this form of governmental discrimination.

Another concern is our desire not to overload the new claims process that we recommend in this report. The addition of new grounds of discrimination that do not seem essential could create an undue burden at the very moment that major changes to the process are being implemented.

We recognize, however, that this ground could become a more significant source of discrimination in the future. Therefore, it would be appropriate for the Commission to monitor the prevalence of such discrimination. In addition, we are recommending a periodic review of the Act in chapter twenty, and we suggest that the addition of this ground be reconsidered at the time of the next review.

Recommendation:

120. We recommend that the Commission monitor the need for the ground of political belief and that the issue be reconsidered at the time of the next review of the Act.

(b) Political Belief

Issue

We were asked to consider whether the Act should be amended to prohibit discrimination on the ground of political belief or opinion.

The Act

The Act currently does not prohibit discrimination on this ground. However, it does cover discrimination based on religious belief which in some respects is similar to this ground.

Seven provinces and one territory prohibit discrimination on this ground in their human rights legislation. However, with the exception of P.E.I., the ground has resulted in very few complaints. For example, the latest annual report of the B.C. Human Rights Commission shows that this was the least used of all the grounds. A large percentage of the P.E.I. cases concern allegations arising from complaints related to patronage in which the complainants have lost government employment or contracts after a change in government. Most reported cases in Canada have dealt with individuals who lost jobs when the political party they supported lost an election. The *United Nations Universal Declaration of Human Rights* provides that everyone is entitled to the rights set out in the *Declaration* without distinction based on, among other grounds, political or other opinion.

Consultations and Submissions

Several submissions during our consultations supported the addition of this ground. However, others suggested caution. For example, one organization noted that a careful definition would be required. Government departments said that consideration of political belief was sometimes legitimate, for example, in cases of national security. Concern was also expressed that the addition of this ground might protect those who disseminate hate propaganda.

The Panel's Views

We have concluded that it is not necessary to add this ground at this time, but we think that the Commission should monitor the situation. Our consultations did not reveal that there was widespread discrimination on this ground on a national scale. In comparison with other grounds, there have been few human rights cases on this ground.

In other chapters of this report, we have noted the importance of focusing more attention on eliminating systemic discrimination and broad patterns of disadvantage and powerlessness. Our research and consultations have revealed no evidence that there is widespread systemic discrimination on the ground of political belief or that this ground is related to patterns of persistent disadvantage.

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Recommendation:

120. We recommend that the Commission monitor the need for the ground of political belief and that the issue be reconsidered at the time of the next review of the Act.

(c) Criminal Conviction or Charge

Issues

The Act currently prohibits discrimination against persons who have been convicted of an offence and then pardoned. Other human rights legislation in Canada protects those convicted, even without a pardon.

The question is whether the limitation placed on the protection offered by the Act, that is, the granting of a pardon, is appropriate.

There is a further issue, which is whether the protection from the stigma attached to a criminal conviction should be extended to those charged with a crime.

If either of these extensions is deemed appropriate, should the protection be limited in any way to allay the concerns of employers and service providers?

The Act

The Act prohibits discrimination against convicted offenders to whom a pardon has been granted. Section 25 of the Act defines the ground as a conviction "for an offence in respect of which a pardon has been granted by any authority under law, and if granted or issued under the *Criminal Records Act*, has not been revoked or ceased to have effect."

Pardons granted under the *Criminal Records Act* are available to those convicted of a criminal offence on the basis of good behaviour for a certain period after completion of their sentence.

Six provinces do not offer any protection against discrimination on the ground of conviction, pardoned or not. Three jurisdictions prohibit discrimination on the ground of pardoned conviction (one additionally provides protection from discrimination on the ground of simple conviction of a provincial offence). Four jurisdictions prohibit discrimination on the ground of conviction where it is not relevant to the applied-for job or service. The tribunal in one of these jurisdictions has interpreted this protection to extend to persons charged with an offence.

Discussion

We heard submissions from individuals and groups who believed that an offender who had served his sentence should not suffer further from the stigma attached to a criminal conviction. They thought there should be fewer barriers to the social reintegration of convicted offenders.

On the other hand, we heard from employers and service providers who were concerned about the effect such an extension of the protection afforded by the Act would have on their operation. Some said they had to conduct security checks to ensure the trustworthiness of employees dealing with confidential information. Concerns were also expressed by employers who handle clients' investments, or who provide home services.

The Panel's Views

Parliament has recognized that criminal conviction carries with it a stigma that can lead to discrimination. In 1977, it chose to add criminal conviction to forbidden grounds for discrimination, but made it subject to a limitation, that is, it applies only if a pardon has been granted. There have been few cases filed with the Commission on this ground.

We are of the view that the protection provided by Parliament to pardoned criminal offenders should be extended to individuals convicted or charged with a criminal offence. However, this protection should only be given if the criminal conviction or charge is irrelevant to the job or service at issue. Claimants should have to show *prima facie* evidence that their conviction or charge is irrelevant to the job or the service they are seeking. Protection should also be subject to the right of government to pass regulations dealing with specific security concerns. This would allow the government to define situations where they or other employers will not have to justify their denial of a job or a service. The regulations might also specify which offences are relevant and could be taken into account for certain types of jobs, such as working with young people, or services, such as immigration. Regulations will reduce litigation in obvious cases.

We are concerned that a number of convicted Canadians do not know about or have access to the pardon process. We are concerned about the somewhat arbitrary distinction drawn in the Act between pardoned and unpardoned offenders. The response of employers in the consultations demonstrates how deeply rooted are some of the stereotypes about individuals who have committed a criminal offence. The stigma attached to criminal records is serious and has far-reaching consequences.

In objecting to the extension of the ground, employers and service providers say they should not have to justify their consideration of a criminal conviction or charge. This does not help the social reintegration of

those who have been convicted. The great majority of people with criminal convictions eventually will be released into society, and we think that rehabilitation and the opportunity to obtain a job not only helps those people, but also promotes public safety and security.

The addition of criminal charge is an acknowledgement that under the Charter, an individual is presumed innocent until proven guilty. The knowledge that a job applicant is charged with an offence may well ruin his or her chances for employment.

In a 1982 human rights case involving the cancellation of a fire insurance policy by the Insurance Corporation of British Columbia on the basis of a press report that the homeowner was committed to trial on a charge of trafficking in marijuana, Justice Ritchie of the Supreme Court of Canada wrote: "It is my personal view that a mere allegation of criminal conduct accompanied by a finding of a preliminary inquiry that a *prima facie* case exists against an accused is not enough to warrant the conclusion that such a person is a member of the criminal classes or, as in this case, one associated with trafficking in marijuana. Left to myself I would have concluded that there was no "reasonable cause" for the termination of Mr. Heerspink's policy."

By recommending the prohibition of discrimination on this ground, we are not saying background checks should be illegal or even difficult.

First, we propose that the claimant show *prima facie* evidence that the denial of a job or service was based in part on a conviction or a charge, and that the conviction or the charge was irrelevant to the job or service sought.

Second, once the claimant has proven this, the employer or service provider may show they had *bona fide* justification for conducting a background check. Public safety, national security and the protection of vulnerable groups are the kinds of concerns that would justify such a practice.

The relevance test provides a limitation on this ground, recognizing the legitimate concerns of employers and service providers. There would be nothing preventing a background check where justified; indeed, the check would be made easier in such cases.

However, we do not think it is appropriate to make a criminal conviction or charge grounds for denying employment or services without some certainty that the motive is not abused or used as a stereotype, given the number of Canadians who may be affected.

Recommendations:

121. We recommend that the ground of "conviction for which a pardon has been granted" be extended to protect persons convicted or charged with a criminal offence.

122. We recommend that the claimant be responsible for showing *prima facie* evidence that the denial of employment or service was in part motivated by a criminal conviction or charge and that the conviction or the charge was irrelevant to the employment or service sought.

(d) Gender Identity

Issue

We considered whether the Act should be amended to specifically prohibit discrimination against transgendered individuals. This group includes persons who have undergone or will undergo treatment and surgery to bring their physical gender in line with their psychological gender.

The Act

The Act prohibits discrimination on the ground of sex, sexual orientation and disability.

It has been recognized in some cases that discrimination against transsexuals is discrimination on the basis of sex, and in other cases that it is discrimination on the grounds of sex and disability. The Commission's practice is to admit such complaints on the ground of sex.

Most provinces have legislation allowing persons who have undergone a sex change to modify their gender accordingly in government records.

The British Columbia Human Rights Commission recently proposed a legislative amendment to add gender identity to the list of prohibited grounds for discrimination.

Discussion

We heard numerous instances of discrimination on the ground of gender identity. We were told about the difficulty of seeking changes to government documents and officials' lack of respect for the privacy of transgendered persons seeking government services. We heard about the problems transsexuals experience in the workplace, where adjustments have to be made to accommodate the needs of people who do not fit the majority's gender standards.

Women's groups told us about problems that arise when people who lived part of their lives as men seek services intended for women, particularly services intended for female victims of male violence.

We agree with the view that transgendered individuals are protected from discrimination on the ground of sex or the combined grounds of sex and disability.

However, to leave the law as it stands would fail to acknowledge the situation of transgendered individuals and allow the issues to remain invisible. While these issues are clearly related to sex, this ground may not cover all those encountered in the transgendered experience, especially in the decision to undergo a sex change and its implementation. To say transsexualism is a disability seems to make it a medical matter rather than a matter of life experienced in the opposite gender.

We feel it should be up to the Tribunal to determine whether a claim fits the concept of gender identity. This would allow the term to develop case by case.

As to the concerns raised by women's groups, the Ontario Human Rights Commission, in their study on gender identity, stated that the *bona fide* justification defence would include trauma suffered by habitual users of the service. We agree that once it has been established, the trauma suffered by habitual users of the service would be a justifiable ground for denial of services. The Tribunal will be able to deal with other problems raised by self-identification to the opposite sex as a matter of definition.

Based on past experience, we do not expect a great many cases would be filed on this ground, but we believe nevertheless that gender identity should expressly be added to the Act. However, the cases that do arise can cause substantial harm to those affected, and legal protection is warranted.

Recommendation:

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(e) Social Condition

Issue

We were asked to consider whether social condition should be added as a prohibited ground of discrimination in the Act. None of the current grounds are specifically economic in nature. However, we certainly came to understand the close connection between many of the current grounds and the poverty and economic disadvantage suffered by those who share many of the personal characteristics already referred to in the Act.

This section deals with discrimination on the ground of social condition. A separate but related issue is whether the Act should guarantee certain social and economic rights. That issue is discussed in the next section of the report.

What We Heard About Poverty

During our consultations we heard more about poverty than any other single issue. Many groups are very concerned by poverty in Canada and want government to do something to assist the economically disadvantaged.

We heard a great deal about the growing disparity between poor people and the affluent in Canada. We were struck by the desire expressed by the people who attended our consultations for an instrument to fight back. They wanted the Act to become that instrument.

"Poor people face discrimination every day — indignities, lack of respect from the media, business, and all levels of government. A growing proportion of Canadians are living in poverty, and that poverty is deepening. Growing up in poverty has life-long effects on people's lives and their ability to be healthy and participate in their community." (End Legislated Poverty)

"Discrimination on the basis of poverty is not simply an attack on the dignity and equal citizenship of people living in poverty. It is itself a major cause of poverty." [...]

Systemic patterns of discrimination because of social condition in the private sector [...] exacerbate poverty. Here they are immune from Charter scrutiny and adequate human rights protections for the poor are therefore of even more critical importance [...] Systemic issues of credit-worthiness assessment, deposit requirements, co-signor requirements and the like loom large in the denial of services, housing and facilities to poor people." (Charter Committee on Poverty Issues)

"It is possible that a more expansive application of this ground might have a considerable impact, for example, in corrections and conditional release, given that a large majority of federally sentenced offenders come from relatively disadvantaged socio-economic situations." (Solicitor General Canada)

"The problem with the term 'social condition' is that it is so lacking in specificity that it applies to every member of society and does so on numerous levels. It would appear not to be directed to protecting a particular group, but everybody. [...] A person's social condition at any particular point in time is not necessarily an immutable characteristic [...] and thereby fails the test of immutability. Nor is 'poverty' — if that is the actual characteristic sought to be protected under the description 'social condition' — an immutable characteristic of any individual. There is no question that poverty is an unfortunate occurrence in our society, but one that contains the possibility of being overcome given the variety of mechanisms in place to assist those who are in need." (Canadian Bankers Association)

"The immigration program strives for a balance between humanitarian, family reunification and economic objectives. 'Social condition,' if adopted as a ground of discrimination [...] could bring the CHRA into conflict with the economic objectives of the *Immigration Act* — that is to select and admit people to Canada that can contribute to the country's social and economic well-being [...] If the costs of immigration are seen to exceed the benefits, support for immigration overall could diminish." (Citizenship and Immigration Canada)

"Social condition enables us to recognize the specifics, characteristics and vulnerability of economically disadvantaged persons and to prohibit distinctions based on these objective data and even on stereotypes, disadvantages and prejudices." (Ligue des droits et libertés)

Bill S-11

In June 1998, the Senate passed Bill S-11 to add the ground of "social condition" to the Act. In the spring of 1999, the Bill was defeated in the House of Commons. At that time the Minister of Justice said she wished to address this issue within the comprehensive review of the Act this Panel was asked to conduct.

Other Human Rights Legislation in Canada

The Québec *Charter of Human Rights and Freedoms* is the only provincial human rights law prohibiting discrimination on the ground of social condition. However, several other provinces and territories include narrower grounds, which cover characteristics that would likely be covered by the ground of social condition. Only the federal, New Brunswick and Northwest Territories acts offer no protection from similar discrimination. Newfoundland's legislation uses the term "social origin." Discrimination based on "source of income" (or "lawful source of income") is prohibited in the legislation of Nova Scotia, Alberta, British Columbia, Manitoba, Prince Edward Island and the Yukon. Ontario and Saskatchewan use the term "receipt of public assistance." These grounds do not always apply to all areas covered by the legislation. In British Columbia, for example, the prohibition of discrimination based on the source of income only applies to housing. Ontario prohibits discrimination based on the receipt of social assistance, but only in relation to accommodation (housing).

International Obligations

Internationally, the United Nations Committee on Economic, Social and Cultural rights, in its concluding observations on Canada's performance under the *International Covenant on Economic, Social and Cultural Rights* in December 1998, expressed concern about this issue. The Committee urged federal, provincial and territorial governments "to expand protection in human rights legislation [...] to protect poor people in all jurisdictions from discrimination because of social or economic status."

What Does "Social Condition" Mean?

We were asked by the Minister of Justice to consider the addition of a ground of "social condition" specifically. To consider this question, we need to determine what this might mean and, if we decide to recommend adding it to the Act, whether there should be a statutory definition.

The Québec experience with this ground provides the most guidance about its meaning. Jurisprudence has developed over time. The Québec courts and Tribunal have clarified the factors that should be considered in determining whether an act is discrimatory on the ground of social condition.

In the case of *Commission des droits de la personne du Québec v. Gauthier* (1993), the Québec Tribunal said:

> **"[T]he definition of 'social condition' contains an *objective* component. A person's standing in society is often determined by his or her occupation, income or education level, or family background. It also has a *subjective* component, associated with perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that, as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred."**

This language is generally consistent with guidelines concerning the meaning of social condition issued by the Québec Commission in 1994.

Though "social condition" does not mean the same thing as poverty, for the purpose of our examination, we will take it to refer to identifiable classes of individuals in disadvantaged social and economic situations. This identification rests on the social and economic indicators of disadvantage these individuals share (the objective component), as well as the way they are perceived by others (the subjective component). The idea that a group can suffer because of the perceptions of others and can be defined by those perceptions is contrary to the concept of equality. This is how stereotypes work.

Is There a Need for the Ground of "Social Condition"? Does Such Discrimination Come Within Federal Jurisdiction?

Our research papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy. We believe there is a need to protect people who are poor from discrimination.

Barriers to employment for the socially and economically disadvantaged do not differ a great deal between federal and provincial jurisdictions. Educational requirements set unnecessarily high can create a serious barrier. The unemployed have more difficulty finding a job than those who are employed. The requirement that job applicants pay for an aptitude test, or supply tools or expensive uniforms can also be barriers to employment for the poor.

Barriers to services exist within federal jurisdiction. In banking services, research papers and submissions made to the Panel referred to the attitudes of bank employees and the large number of identification documents required just for opening an account as major barriers. People with low incomes were less likely to have bank accounts than those with higher incomes. They are less likely to possess certain pieces of identification needed for these purposes. Some banks are moving out of lower income neighbourhoods. The freezing of funds from cashed cheques has a significant effect on the poor, who cannot afford to wait for the cheque to clear. People who are poor even have trouble cashing government cheques. We were told during our consultations that complaints were filed with the Commission on behalf of single mothers denied mortgages because they were on welfare or could not meet minimum income requirements. The complaints were dismissed because social condition was not a ground. In the case of *D'Aoust v. Vallieres* (1993), the Québec Tribunal held that the refusal of a mortgage by a provincially regulated financial institution was discrimination on the ground of social condition when evidence showed the complainant had sufficient means to obtain a mortgage, but was refused when the institution found out she was a welfare recipient.

We were told that people who are poor experience problems with telephone services. In its "Terms of Service" published in Telephone Directories, one company advises that generally, it cannot require deposits from an applicant or customer at any time unless: (a) the applicant or customer has no credit history with the company and will not provide satisfactory credit information; (b) has an unsatisfactory credit rating with the company due to payment practices in the previous two years regarding the company's services; or (c) clearly presents an abnormal risk of loss. These terms were approved by the CRTC. We were told in a submission of at least one complaint filed with the Commission challenging a company's decision to categorize a single mother on welfare, but with a spotless credit history, as "an abnormal risk of loss" solely because she was unemployed. According to the submission, the complaint was dismissed by the Commission because "social condition or receipt of public assistance is not a prohibited ground of discrimination under the CHRA."

Housing on Indian Reserves is another matter that falls within federal jurisdiction. In its Concluding Observations on Canada's last report on compliance in 1998, the United Nations Committee on Economic, Social and Cultural Rights expressed "deep concern" about "the shortage of adequate housing, the endemic mass unemployment and the high rate of suicide, especially among youth in the Aboriginal communities."

Many of these factors, such as low income and lack of education, are also barriers facing groups characterized by other grounds, such as race and disability. A disproportionate number of people from the First Nations, for example, live in extreme poverty and have few educational and employment opportunities.

Some barriers related to poverty could be challenged on one or more of the existing grounds. However, these cases have rarely been successful. They are difficult to prove because they do not challenge the discrimination directly. Such a case may require complex expert testimony about the economic status of the group affected, since it may be necessary to show a disproportionate effect on a particular group. Evidence can be even more difficult to obtain if the case involves the interaction of multiple grounds. Perhaps more fundamentally, if a policy or practice adversely affects all poor people or all people with a low level of education, a ground-by-ground consideration of the issue can be seen as a piecemeal solution that fails to take into account the cumulative effect of the problem.

Is "Social Condition" Similar to Other Grounds Now Included in the CHRA?

The Act's focus on the prohibition of discrimination on the listed grounds defines its purpose in many ways. The current grounds represent the kinds of distinctions that have had a discriminatory effect on individuals in the past and can be expected to continue to have this effect unless steps are taken to prohibit their unjustifiable use.

We thought it would be appropriate to consider whether the ground of social condition would result in similar protection for similar reasons.

In deciding whether an individual or a group are protected by the equality provisions of the Charter, the courts usually consider the following:

(a) whether the personal characteristic is immutable because it is beyond the control of the individual or cannot be altered except at an unacceptable cost to the individual;
(b) whether those possessing the characteristic lack political power;

(c) whether there are historical patterns of discrimination against individuals with this characteristic;
(d) whether members of the group experience similar social and economic disadvantage;
(e) whether there is a relationship between the personal characteristic shared by members of the group and the grounds listed in the Charter.

The general definition of social condition we are using covers persons who experience patterns of social and economic disadvantage. The aim is to target protection by using personal characteristics in the same manner as equality concerns are raised under the Charter.

The Panel can hardly dispute the fact that characteristics such as poverty and a low level of education have historically been associated with patterns of disadvantage. However, some of the other criteria are open to debate. For example, some people escape poverty and improve their level of education. The Québec definition of social condition covers such situations as being on welfare. If those factors are treated as constituting singly a specific social condition, they do not appear immutable. It is fair to ask whether social condition at any time should be considered immutable.

Further, the courts have not often found such characteristics as occupation or job status, income level or source of income, residence or detention in a correctional facility to be protected grounds under the Charter. But there have been a few cases where the courts have protected from discrimination groups defined by a number of grounds at once, such as single motherhood, race and age.

Research done for the Panel shows that poverty is immutable in the sense that it is beyond the control of most poor, at least over considerable periods of their lives. There is evidence that poverty is inherited because individuals whose parents were poor are more likely to live in poverty. Similarly, there is a correlation between one's educational level and that of his or her parents. Our research also shows that while people may move from social assistance to a low-paying job to employment insurance, few actually move into income levels high enough to escape their condition of poverty.

We heard a great deal about prejudice against people just because they are poor. The National Anti-Poverty Organization stated before the Senate committee:

"[...]The issue here is not poverty itself, but, rather the gratuitous discrimination against the poor.[...] Those of us on the receiving end of this treatment understand what a blatant affront to human dignity this treatment is." (Fred Robertson, NAPO testimony, Senate Standing Committee on Legal and Constitutional Affairs)

There is a difference between a valid justification for the refusal of a loan and a denial based on stereotypes about the poor.

We were given examples showing that prejudice against the poor goes so far as to question their concern for their children and their parental ability.

"What consigns children to poverty is a change in attitude of their parents.[...] To enter into parenthood single, as a lark, because you just felt it would be a fun thing to do, is impossibly selfish. We compound their [the parents'] folly by telling them not to bother learning how to feed their children a nutritious breakfast. Don't worry, we say. Send your kids to school and we'll set up a breakfast program. Do vast droves of kids starve to death during the summer vacation when the programs aren't available? Of course not. Their mothers are forced to feed them." (Breaking the poverty cycle, November 28, 1999, by Christina Blizzard — *Toronto Sun*)

"If we want children to get a good and healthy start in life, what we need more than anything else is responsible parents." (The Fraser Institute, Fraser Forum, January 1997, In the Interests of Children, Chris Sarlo)

"It might be good for teachers and health workers who come in contact with Canada's poorest parents to help them as well. It's possible that loving attention to one's children cannot be learned. But what a shame it would be if our compassionate society did not try to teach it." (Editorial — *Globe and Mail*, April 21, 1997)

"That's why health and education policy makers should help Canada's most needy children, often the poorest ones, by helping their mothers and fathers learn how to be better parents." (Editorial — *Globe and Mail*, April 21, 1997)

"In general, children in poor families have the parental deck stacked against them in the first three years of their life.[...] A supply-side approach to poverty would invest mightily in the time availability and parenting skills of poor parents.[...]" (William Thorsell — *Globe and Mail*, November 30, 1996)

Ontario Premier Mike Harris cut a $37 welfare supplement for pregnant beneficiaries — expressing concern that the funds were squandered.

> "What we're doing, we're making sure those dollars don't go to beer, don't go to something else, but in fact, if there are requirements for the health of the mother, they'll get it from us. [...] But it won't be a blanket cheque that can be spent on anything. It will be spent to the benefit of the child." (Premier apologizes to welfare recipients, *Ottawa Citizen* — April 17, 1998)

He later apologized for the comment.

Our research produced the following quotation taken from a "confidential" memo about the groups used in political focus testing for the federal strategy on child poverty.

> "Somewhat surprisingly, moral explanatory accounts of poverty were more common and powerful perceived causes of poverty: lack of responsibility, effort or family skills were universally cited explanations ... Most secure participants see children as deserving and their parents as less so [possibly unwitting agents of their children's misfortune] [...] Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes [bingo, booze, etc.] reveal a range of images of SARs [Social Assistance Recipients] from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy." (Obtained by Jean Swanson of End Legislated Poverty under Access to Information from HRDC)

There is an interrelationship between the ground of social condition and other grounds listed in the Act such as race, sex and disability. The severely disabled and single older women are among the poorest in Canada. Women still earn less than men on average. Illiteracy (in French or English at least) might be associated with disability or national or ethnic origin. Yet, as noted earlier, even taken together, those grounds do not encompass all people who are illiterate.

Many expressed the concern that social condition is too vague, unlike grounds such as sex and colour. The income and education criteria are relative. However, our research suggests that if we were to recommend a narrower ground of discrimination, such as receipt of public assistance, the protection provided by the Act would become fragmented. Many would only be protected temporarily while on welfare and lose that protection when their source of income changed, even though the disadvantages they suffer might remain the same. The term "poverty" should be avoided because there is no consensus about its meaning or measurement. Our research tells us that the Low-Income Cut-off (LICO) set by Statistics Canada is used by most researchers in Canada, but Statistics Canada only sanctions its use as an indicator of "strained economic circumstances," not as a poverty threshold. On the other hand, the very existence of stereotypes about the poor shows they are often seen and treated as a distinct group. Existing grounds such as age and disability are also relative, and there is considerable debate about how to define disability and race.

Some might say poverty and illiteracy are less likely to form part of an individual's identity than sex or religion. On the other hand, our research shows that the persistence of such factors and the way they shape social and economic relationships suggest they are a part of one's identity or perceived identity.

Adding the Ground

We believe it is essential to protect the most destitute in Canadian society against discrimination. At the very least, the addition of this ground would ensure there is a means to challenge stereotypes about the poor in the policies of private and public institutions. We feel that this ground would perform an important educational function. It sends out a signal about assumptions and stereotypes to be taken into account by policymakers.

Litigation on this ground should not displace study, education and the need to look at other means to find solutions to the problems experienced by the people who are poor. The best way to combat poverty and disadvantage remains private and public activity aimed at improving the conditions of the socially and economically disadvantaged. Perhaps the addition of this ground will spark more of this activity. We hope so.

As a further step, the ground of social condition should be added to the list of grounds in the affirmative action or equity program defence. Public and private organizations should be able to have programs aimed at improving the conditions of individuals on the grounds specified in the Act, including this one.

We heard some concerns that adding this ground could overwhelm the Commission with claims based on social condition. However, the Québec experience does not suggest there would be a large number of claims on such a ground.

The Panel also believes that the Commission should carry out studies on social condition in the furtherance of its educational purpose.

The Definition

The Panel believes that the ground of social condition should be defined in the Act in a manner similar to the Québec definition, with the addition of a provision limiting it to disadvantaged persons.

The Québec definition quoted above is not in fact a single definition, but a list of characteristics to look for in assessing whether an action is discriminatory. As the Québec Tribunal states, it is not necessary to prove the presence of all of these characteristics (objective and subjective) in a single case. But the characteristics must describe a socially identifiable group (the objective component). The subjective component is an important element of the definition because it helps distinguish between people perceived as part of a socially identifiable and stereotyped group, and other individuals, such as students, who may temporarily have a low income but are not subject to such perceptions of inferiority.

The fact that a tribunal must consider whether the claimant has shown the presence of a number of factors in what is alleged to be a discriminatory act, rather than a single personal characteristic as is the case with most of the other grounds, makes the tribunal's job harder. It would be simpler if the tribunal only had one factor to consider, for example, the level of income. However, the advantage of the multiple factor approach is that it reflects the subtlety of the perceptions about a group of disadvantaged individuals who may not all share the same characteristics, but who suffer from a similar sort of persistent disadvantage.

The Québec definition also contains factors that are a matter of degree, such as the level of income or wealth and education. This means that this ground is different from a ground such as sex. However, the Act prohibits discrimination on such grounds as disability, which is often a matter of degree. The fact that the definition contains a number of factors makes the definition more flexible and avoids the need to make specific rules about where to draw the poverty line, for example. This way, poverty would be considered as one factor in determining whether a person's social condition has resulted in discriminatory government or private action. Other relevant factors could be considered and weighed to determine whether the treatment of this individual or group of individuals was based on this ground.

The Panel considered whether the ground should cover only disadvantaged persons or also persons distinguished as a group by their privileged position. In other words, we wondered whether the definition should be a neutral term like race or sex or refer to disadvantage like the ground of disability. There have been cases in Québec where the ground was held to prohibit discrimination against individuals with above average incomes or prestigious occupations. In our view, this is not appropriate for two reasons. First, we feel that the protection here is aimed at those who suffer disadvantage because of their social condition. Second, we do not want to propose a ground that is too broad. The Act could contain a definition similar to a proposed (but defeated) amendment to Bill S-11, which provided that "*social condition* includes characteristics relating to social or economic disadvantage."

We believe the ground of social condition should be designed to protect persons whose situation of poverty is ongoing rather than persons who may temporarily find themselves in that condition.

Possible Exemptions

It is clear that rights are not absolute. Any discussion of a right must consider whether other factors should be put in the balance with it.

Litigation on this ground would require the Tribunal to deal with economic and social issues that courts have not yet seen under the Charter. Most of the cases in Québec on the ground of social condition have concerned residential accommodation. These cases will have few equivalents in the federal sector because housing is a matter of provincial jurisdiction, though federal government housing policy and bank mortgages would fall within federal jurisdiction. Housing issues involving Aboriginal people living on reserves is also a matter within federal jurisdiction. There are only a few cases where complaints based on social condition in employment and services were successful in Québec.

The pattern of complaints in the federal sector could be substantially different. Many statutes and government programs make distinctions based on economic classifications. There are cases where the Tribunal and

the courts held that the concept of "services [...] customarily available to the general public" covers a broad range of governmental activity, including matters such as unemployment insurance, policing, immigration, employment and research grants, and even taxation under the *Income Tax Act*. And, as stated earlier in our Report, the Supreme Court of Canada has held that human rights legislation has primacy over other legislation. The Tribunal's remedial powers are also relatively broad.

The Panel is concerned that the addition of this ground may lead to considerable litigation over complex government programs and an overall reluctance by government to initiate social programs.

We could see challenges against many laws and programs, including tax and immigration laws, employment insurance and training programs, on the ground that they discriminate against the socially and economically disadvantaged. If those laws and programs are found to be services available to the general public and if the principle of primacy means they are inoperative where they conflict with the Act, the Tribunal would have the power to nullify legislative and government decisions that have very wide policy and budgetary implications. Of course, government agencies could put forward the *bona fide* justification in the case of services. This could involve the Tribunal in weighing policy choices like the courts are called on to do under the Charter. It is not clear how well the *bona fide* justification is suited to deal with these concerns. The Tribunal and the courts have not been very consistent in defining the defence they apply in primacy cases.

Recently, the courts have been tending to narrow the interpretation of the concept of "services" in cases where there may be a conflict with other statutes. Increasing their policy role might give the courts an incentive to continue narrowing the scope of the protection offered by the Act.

One way of limiting the effect of the ground would be to recommend a narrow definition of social condition. This does not seem to the Panel to be a good idea because it would limit the good that the addition of the ground might give and hinder the future development of the ground. Instead, we are recommending that the ground be defined in a manner similar to that developed in Québec, with the exception that it would be limited to people who are disadvantaged.

On the other hand, we believe that some government programs could involve the Tribunal in complicated policy issues on which it should not be in a position to second-guess the government. The complicated scheme of taxation under the *Income Tax Act* is a good example. Another might be immigration, where issues of control over entry into Canada are at stake. We believe the government should be able to adopt programs intended for certain categories of underprivileged without these programs being challenged because they do not address all categories of underprivileged. The government should be able to exempt such programs from the Act at least for a limited, renewable time. We feel there should be a time limit on the exemption because other exemptions we have been called upon to consider more than twenty years after passage of the Act were provisionally placed in the Act in 1977. This would allow the exemptions to be reduced as experience with litigation on this ground grows. It might be feasible to review the exemptions as part of the five-year review of the Act we are recommending in chapter twenty. The government should be able to justify any exemption made this way. Exemptions should not be used as an *ad hoc* way of avoiding scrutiny when the government simply wants to shield from litigation a service for which there is no provable justification. These exemptions are meant only for true government services, and not services provided by Crown Corporations or Departments that are similar to those in the private sector.

The ground would apply to services offered by the private sector too. However, these services are closer to the kind of services meant to be defended using the *bona fide* justification. In the *Dickason v. University of Alberta* (1992) case on mandatory retirement, the Supreme Court of Canada ruled that the kind of deference given to broad governmental decisions based on competing claims for resources should not be extended to the private sector.

Finally, we are aware that our recommendations concern only discrimination based on the condition of underprivileged persons and that the Act does not cover the whole reality of poverty, which comes under the general responsibility of government.

Recommendations:

124. We recommend that social condition be added to the prohibited grounds for discrimination listed in the Act.

125. We recommend that the ground be defined after the definition developed in Québec by the Commission des droits de la personne and the courts, but limit the protection to disadvantaged groups.

126. We recommend that the Minister recommend to her Cabinet colleagues that the government review all programs to reduce the kind of discrimination we have described here and create programs to deal with the inequalities created by poverty.

127. We recommend that the Act provide for exemptions where it is essential to shield certain complex governmental programs from review under the Act.

128. We recommend that the Act provide that both public and private organizations be able to carry out affirmative action or equity programs to improve the conditions of people disadvantaged by their social condition, and the other grounds in the Act.

129. We recommend that the Commission study the issues identified by social condition, including interactions between this ground and other prohibited grounds of discrimination and the appropriateness of issuing guidelines to specify the constituent elements of this ground.

(f) Social and Economic Rights and the Act

Issue

The issue of social and economic rights, related to social condition, is not specifically part of our mandate, but it became clear to us during our consultations that we had to deal with it. Many participants asked us to consider adding to the Act the social and economic rights recognized by international agreements to which Canada is a signatory.

Through a number of international documents, Canada has recognized many basic rights such as the right to adequate food, clothing, housing, health care, social security, education, freely-chosen work, child care and social support services.

The United Nations Committee on Economic, Social and Cultural Rights, in its most recent report on Canada, recommended to "expand protection in human rights legislation to include social and economic rights." However, the Committee did not make any recommendations about the way this should be done.

The Act

The Act is designed to protect against discrimination on the listed grounds. It does not contain rights to a particular benefit, such as the right to adequate health care. However, many groups protected from discrimination by the Act suffer serious economic and social disadvantage, and discrimination contributes to that disadvantage. If, for example, a person experienced discrimination on the ground of disability regarding health care or other social programs, the Act would provide protection. But it does not give a general right to such programs.

Consultations and Submissions

The Panel received a number of oral and written submissions supporting the inclusion of social and economic rights.

A number of groups cited the need for a mechanism to challenge the substitution of the Canadian Health and Social Transfer payments — the way the federal government financially supports provincial social assistance, health and educational programs — for the old *Canada Assistance Plan*, which specified standards for provincial programs.

The Canadian Association of the Non-Employed noted that the international community has recognized for some time that human rights are indivisible and that social and economic rights cannot be separated from political, legal and equality rights, and that it is time for Canada to also recognize poverty as a human rights issue.

However, most of these submissions did not specify which rights should be included or say how they should be enforced.

The most detailed discussion of social and economic rights was found in the paper of Professor Martha Jackman and Bruce Porter entitled "Women's Substantive Equality and the Protection of Social and Economic Rights under the *Canadian Human Rights Act*" in the collection of policy papers published by Status of Women Canada.

Jackman and Porter argue in favour of the inclusion of social and economic rights. They argue that the addition is consistent with Canada's international obligations and that the Act is an appropriate place to protect these rights. They propose that the Act include an obligation on Parliament and government to take progressive steps toward the realization of these rights, including changes to taxation and fiscal policies and arrangements with the provinces. They recommend a very elaborate system to enforce these rights, including the creation of a special committee of the Commission to establish standards to evaluate compliance with these rights and a special panel of the Tribunal to hear these issues. This panel would have the power to amend legislation, subject to veto by Parliament within a specified period. Professor Jackman and Mr. Porter also would have complaints about the discriminatory denial of these rights dealt with in the regular complaint process.

Discussion

We recognize there is a close connection between equality issues in the Act and poverty in Canada. As we stated in our earlier section on social condition, there is compelling evidence that some of the groups the Act is intended to protect are among the poorest in Canada.

As the Canadian Association of Independent Living Centres said in its written brief: **"Canadians with disabilities are not tangential to this debate [...] Social and demographic data [...] clearly demonstrates that persons with disabilities face very real social and economic disadvantage in Canadian society, all of which can be traced as historic disadvantage."**

The only Canadian human rights legislation that includes a form of social and economic rights is found in sections 39 to 48 of the Québec *Charter of Human Rights and Freedoms*, which cover the following rights:

- the right of a child to parental protection, security and attention;
- the right to a free public education, to the extent provided by law;
- the right of parents to require that public educational establishments provide their children with religious or moral education in conformity with their convictions, within the framework of the curricula provided by law;
- the right of parents to choose private educational establishments for their children where those establishments meet with standards prescribed by law;
- the right of persons belonging to ethnic minorities to maintain and develop their own cultural interests;
- the right to information, to the extent provided by law;
- the right to financial assistance and to social measures provided by law, to ensure an acceptable standard of living;
- the right, in accordance with the law, to fair and reasonable conditions of employment;
- the equal rights of spouses;
- the right of the aged and the disabled to be protected against exploitation and to enjoy the protection and security of their family.

This model would have to be modified to become a federal statute because many of these rights come primarily, if not entirely, within provincial jurisdiction. Also, many of the above rights are provided only "to the extent provided by law." The provision of the Québec Charter giving it priority over other legislation does not apply to these rights. Because of these limitations, the courts have not applied these rights extensively and have interpreted them narrowly. Therefore, the Québec experience provides limited assistance in considering how they would operate if included in the Act.

The Panel is of the view that the direct enforcement of social and economic rights in Canada through Tribunal orders would require a substantial extension that we do not think is feasible at this time. However, we think that the Commission could play a useful role by monitoring and reporting on these rights.

We are concerned about the breadth of the issues — legal, constitutional and political — that would be raised by the addition of social and economic rights to the Act that were enforceable by Tribunal order.

Legally, it would be necessary to define these rights very carefully if they could lead to Tribunal orders. The social and economic rights described above are extremely broad. In addition, Canada is a party to a large number of international agreements that contain what might be considered social and economic rights, and it would take considerable work to develop a list of rights appropriate for federal legislation. International agreements such as the *International Covenant on Economic, Social and Cultural Rights* are not legally enforceable. Therefore, they provide little guidance as to what modifications should be made to change them into enforceable rights. For example, standards would have to be developed to establish what is or is not an adequate level of social security if the right to adequate social security were an enforceable right.

A second legal issue is who would be obligated to provide these rights. The provisions of the Act apply both to the public and private sectors. If social and economic rights were added to the Act, it would be necessary to determine whether some or all of them impose duties on both public and private entities or just on governmental entities. For example, what would be the nature of the duty of private organizations to provide adequate housing or social security?

Another legal issue concerns what defences and limitations should apply to these rights. The defences now in the Act deal with allegations of discrimination, not social and economic rights. They might have to be modified extensively if applied to social and economic rights, which are usually subject to the limitation that they should be realized progressively. For similar reasons, the remedies in the Act would have to be modified substantially to be useful in enforcing social and economic rights.

There are also a number of constitutional concerns. Many of the social and economic rights that have been mentioned come within the ambit of the provinces or are areas where federal involvement is limited to providing financial assistance to provinces. The joint federal, provincial and territorial nature of these matters suggests that they could be better dealt with in some other manner than a federal statute, such as a constitutional document on federal, provincial and territorial powers and the way they relate to each other. The proposed power to allow an administrative agency to

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amend legislation also raises serious constitutional questions.

Politically, the proposal raises issues of principle and practicality. One question of principle concerns the degree to which an administrative agency such as the Tribunal should be empowered to overturn decisions of Parliament on broad policy issues such as taxation policy or what is or is not an adequate level of social security. We must also consider whether it is realistic to expect Parliament to decide to share its power with the Tribunal about such matters.

Concerns such as these lead us to the conclusion that we should not recommend the addition of social and economic rights at this time and that the Tribunal be empowered to grant orders enforcing them. However, we do believe there is a role to be played by the Commission in monitoring Canada's compliance with international human rights treaties, either alone or in cooperation with provincial human rights commissions. We think cooperation would be a good idea because, as the above discussion clearly shows, many of the major issues have a cooperative component.

The Commission would be the appropriate monitoring body because it is independent from government, has the necessary expertise in human rights issues, can encourage consultation between the government and interested organizations, and has a general mandate to educate Canadians about human rights. The Commission already has some of these powers. In particular, section 27(1)(e) of the CHRA provides that the Commission:

> "may consider such recommendations, suggestions and requests concerning human rights and freedoms as it receives from any source and, where deemed by the Commission to be appropriate, include in a report [to Parliament] referred to in section 61 reference to and comment on any such recommendation, suggestion or request."

There are some limitations on this power, such as the triggering request, but it can be expected a request would be made on any significant issue. Further, the reference to human rights and freedoms suggests a scope broader than the rights in the Act. The extension to a monitoring power would not be a great step. The Commission would be able to make the public aware of these matters that could lead to more effective protection of these rights. It would gradually allow the Commission to build up expertise and its reputation in considering social and economic rights.

In 1993, the United Nations Human Rights Committee and the General Assembly endorsed the Paris Principles setting out minimum standards for national human rights institutions. The document says that such an institution should promote the harmonization of national legislation, regulations and practices with international human rights instruments, and shall contribute to the reports that the State must make to United Nations bodies.

In its 1998 review of Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights*, the Committee asked the government to provide information regarding the human rights commission's position on whether "social condition" should be added to human rights legislation (with the exception of Québec). Given the interest expressed by the Committee in the Commission's views, it makes sense that the Commission should have the power to monitor Canada's compliance with international human rights treaties included in its legislation. The Commission now has the power to review "regulations, rules, orders, by-laws and other instruments made pursuant to an Act of Parliament" under section 27(1)(g), and it has the power to review some special legislation such as government pension plans under section 62(2). The Panel sees the Commission's power to monitor Canada's compliance with international treaties as consistent with its existing power to review domestic regulations.

Recommendation:

130. We recommend that the Commission should have the duty to monitor and report to Parliament and the United Nations Human Rights Committee on the federal government's compliance with international human rights treaties, included in its legislation. Provincial and territorial human rights commissions, in consultation with the Commission, may wish to comment on matters within their respective jurisdictions.

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(g) Language

Issue

We considered whether language should be added as a ground of discrimination in the Act. We heard from a number of organizations during our consultations that language should be added as a prohibited ground. Other groups placed greater emphasis on the need for accessibility to language training in Canada's official languages. It was also suggested that the Commission draft a policy statement concerning the relationship between discrimination based on language and grounds that are now included in the Act.

The Act

The *Canadian Human Rights Act* does not expressly prohibit discrimination based on language. However, it does prohibit discrimination on the basis of national or ethnic origin. Discrimination based on language is especially likely to affect those people whose first language is the language of their place of birth or is related to their ethnic origin. Where a link can be established between national or ethnic origin and the discrimination based on language, the present wording of the Act provides protection and an employer or service provider may be liable unless it is proved that the language requirement is a *bona fide* occupational requirement or *bona fide* justification.

We must also take account of the *Official Languages Act*. That Act applies to federal government institutions and governs the language of the workplace in those institutions. It also deals with the provision of services to the public in both official languages. The *Official Languages Act* represents official government policy and has primacy over all other legislation except the *Canadian Human Rights Act*. One of its goals is to ensure that all regions and people speaking both official languages have equal opportunities for participation in the democratic process at the federal level. When the government of the day introduced the *Canadian Human Rights Act* in 1977, it cited the existence of the *Official Languages Act* as influencing its decision not to include the ground of language in the *Canadian Human Rights Act*. We also note that the *Canadian Charter of Rights and Freedoms* has provisions concerning the two official languages, including the right to receive services in English or French from specified federal government institutions.

The Panel's Views

Adding the ground of language is more complex than may at first appear. The right to equality underlies both the *Canadian Human Rights Act* and the *Official Languages Act*, though the two statutes protect that right in different ways. These statutes should work together to achieve linguistic equality, and it would be unfortunate if changes to one of them undermined the goals of the other. An added element of complexity is that the *Official Languages Act* applies only to governmental institutions while the *Canadian Human Rights Act* applies in both the public and private sectors. We must also, of course, consider the constitutional status of Canada's official languages and the fact that our mandate does not extend to all aspects of linguistic equality, but only to changes to the *Canadian Human Rights Act*.

In the Panel's view, most instances of discrimination based on language are related to national or ethnic origin. Therefore, the present wording of the Act protects against such discrimination. We are reluctant to recommend the addition of a new ground that is not absolutely essential since the change could place an added burden on the new process we are recommending. We also think further study would be required before any changes are made, including a study of matters beyond our mandate.

Submissions received by the Panel, notably those of the Commissioner of Official Languages and the *Fédération des Communautés Francophone et Acadienne du Canada*, recommended that the Commission formulate a policy statement concerning the connection between language and national or ethnic origin. It was noted that the Ontario Human Rights Commission has formulated such a policy. We think this possibility deserves consideration by the Commission.

CHAPTER 18
Exceptions to the Act

(a) Mandatory Retirement

Issue

Section 15(1)(b) of the Act permits employers to terminate or refuse to employ an individual once they have reached a maximum age set by law. Section 15(1)(c) provides that it is not a discriminatory practice to terminate someone's employment at the normal age for retirement for employees in similar positions. Section 9(2) provides that it is not a discriminatory practice for unions to terminate membership at the normal age for retirement.

Should the exceptions in the Act that permit mandatory retirement policies be eliminated to permit workers flexibility in choosing when to retire in the federally regulated sector, except where an employer can justify it?

The Current Environment

In 1986, in *"Toward Equality"*, a response to the Parliamentary Committee Report *"Equality Now"* on equality issues in federal law, the federal government agreed to eliminate the provisions in the Act that permit mandatory retirement policies.

In 1992, the federal government tabled amendments to the Act in *Bill C-108* that would have eliminated these exceptions and would have provided transitional provisions to provide employers and unions with time to adapt. That Bill did not reach second reading in the House.

Nevertheless, the federal government did abolish mandatory retirement in the federal public service in 1986. Since that time, the number of individuals who have chosen to work past 65 is quite small. In fact, a significant number of individuals, when offered the opportunity, choose to retire early. The federal government encouraged early retirement with an incentive program.

There are special early retirement policies for the Canadian Forces and the RCMP.

Research commissioned by the Panel disclosed that only 25% of federally regulated private sector organizations still have mandatory retirement policies.

Mandatory Retirement Exceptions and the Charter

The courts have rejected challenges to the exceptions in human rights legislation that permit mandatory retirement.

In *McKinney v. University of Guelph* (1990), which challenged the provision of the Ontario *Human Rights Code* that prevented complaints about discrimination over the age of 65, the Supreme Court of Canada held that this was age discrimination, but that it was justified as a reasonable limit to the equality right. The Court found that this limitation was a legislative compromise between protecting individuals from discrimination and creating a situation that might result in delayed retirement and benefits for older workers. This has both labour market and pension ramifications. The Court did consider the issue of access to the paid work force by younger workers, but accorded little weight to this factor.

Mandatory Retirement and Human Rights Laws

Some mandatory retirement policies have been upheld in challenges brought under provincial human rights laws because they were justified in the circumstances.

In *Dickason v. University of Alberta* (1992), involving the mandatory retirement of university professors, the Court upheld a mandatory retirement clause in a collective agreement policy, finding that it met the statutory justification because it was "reasonable and justifiable in the circumstances" — the relevant defence in the provincial human rights law. The Court balanced the right of an individual to choose when to retire and the objectives of preserving the tenure system, promotion of faculty renewal, human resource planning and retirement with dignity for individual professors. The Court considered the rights of the employer and union to bargain on an equal footing for a mandatory retirement date in their collective agreement to be an important factor.

Mandatory retirement policies have had mixed success in occupations involving safety of employees and the public. Every human rights Act balances the right of the individual to be free of discrimination with the valid interests of the employer in employment through the *bona fide* occupational requirement. Though the

term used for this defence varies slightly from jurisdiction to jurisdiction, the different statutes are interpreted the same way by the Supreme Court of Canada.

The *bona fide* occupational requirement requires employers to demonstrate that a particular qualification is (a) rationally connected to a purpose connected to the performance of the job, for example, safety, (b) that it is made in good faith and (c) that it is reasonably necessary for that purpose — that it is impossible to accommodate individuals with the same personal characteristics as the complainant without undue hardship. Risk must be determined as part of undue hardship and not as an independent justification. The focus of the test is on accommodation, on the actual capacity of the individual and not stereotypical assumptions about what a person can or cannot do.

In the leading case of *Ontario Human Rights Commission v. The Borough of Etobicoke* (1982), the Supreme Court of Canada held that the mandatory retirement policy that required firefighters to retire at age 60 had not been shown to be a *bona fide* occupational requirement. Other such policies have been upheld. It is a question of proof in each case.

In *Martin v. Canadian Forces* (1994), the Federal Court of Appeal upheld a decision of a Tribunal that found that the mandatory retirement policy of the Canadian Forces was not a *bona fide* occupational requirement. After the Tribunal decision, the Governor in Council passed a regulation that established a maximum mandatory retirement age by law for the purpose of section 15(1)(b) mentioned above so that they could continue the practice.

Consultations and Submissions

We heard from employers that they preferred to leave the issue of mandatory retirement to the collective bargaining process. One employer stated that the repeal of this provision would lead to significant increases in health costs to employers. Health benefits for older employees are more expensive than they are for younger employees. Further, we heard that voluntary retirement creates uncertainty in human resource planning. In addition, we heard that removing the blanket defences for mandatory retirement would provide employees with rights under the *Canada Labour Code* which supposedly were never intended by this provision, such as a right to severance pay when they were forced to leave by their employers and the right to complain about unjust dismissal.

FETCO believes that legislators should recognize that a change in the CHRA to eliminate mandatory retirement would have significant social and financial ramifications.

Some unions indicated a preference to bargain for mandatory retirement provisions in their collective agreements. The Canadian Auto Workers stated : **"The present "permissive" legal framework in which unions and employers continue to have the right to choose to eliminate mandatory retirement through collective bargaining, in order to reflect the wishes of the affected employee constituency, remains the fairest approach towards the necessary balancing of rights and interests entailed in a reasonable consideration of this issue."**

"Retirement should be based on the number of years of service and a person's ability to continue to do the job, not on age. Some women who have spent many years raising families enter the work force later than men and do not have enough years of service to build an adequate pension." (The National Indo-Canadians Council)

The Panel's Views

We have come to the view that there should be no blanket exemption for mandatory retirement policies, but at the same time feel that we have not had enough time to study what should replace the current provisions of the Act. It is clear to us that further study is needed based not only on the social and economic factors at play, but more importantly in our view, the equality issues.

We will first discuss what has led us to the view that the blanket exceptions should not continue.

The Panel is of the view that mandatory retirement is age discrimination. This is clear from the cases decided by the Supreme Court of Canada which have left no room for debate about this question. Fundamentally, a mandatory retirement policy simply takes away the choice of when to retire from the older worker. Even if there was sufficient evidence to support the idea that mandatory retirement opens jobs for the young, the need for the dignity of older people would seriously put in question the appropriateness of this policy. It may also force many older people into poverty if they have not been able to save enough for their later years.

Mandatory retirement policies may have an adverse effect on new immigrants and women. They may have had a shorter period to build up a pension because of

absences from the paid work force for family responsibilities or because of a short period of employment in Canada. Further, for women who have taken time off for family responsibilities, mandatory retirement may cut them out of the work force at the pinnacle of their careers.

Women and recent immigrants often have insufficient retirement income from public and employer pension plans or registered retirement savings plans. Forced retirement may result in poverty for these groups of workers. One solution might be to improve the public pension system, but the aging population in Canada could make this solution quite costly. Although it is not a matter within the scope of a review of this Act, we think the government should consider the situation of these groups when reviewing the public pension system. We cannot, however, base our recommendations on the assumption that such a change will occur.

In our research, we found very little empirical evidence for generalized assumptions between age and negative job performance and that there are more variations within age groups than among age groups. There may be some decline in physical capacity, such as slower reaction times, but older workers do as well as or better than younger workers in terms of creativity, flexibility, and information processing with lower accident rates, absenteeism and turnover.

Need for Further Study

Mandatory retirement has a number of important impacts on the economic system. Further, in challenges under the Charter and under human rights legislation, the courts have shown that they are of the view that the individual rights at stake must be balanced with broader concerns such as the role of collective bargaining and the special needs of important institutions such as universities.

Some of the following factors have led us to this conclusion:

- We considered the link between mandatory retirement and the issue of pensions and benefits. Pension plans do not require a mandatory retirement age but they do require a specific "age" to establish when an individual is eligible for full benefits. However, if mandatory retirement is eliminated, it will be necessary in the future to look at the impact on disability, pensions and other benefits in collective agreements and in employer policies.
- We are concerned that removing the blanket justifications for mandatory retirement may have the effect of moving a government policy of assistance for senior citizens towards a policy based on an expectation that Canadians should work longer and should expect less from the government in their old age.
- Adjustments might have to be made to legislation if mandatory retirement were eliminated. For example, the *Canada Labour Code* now provides that an employer does not have to pay severance pay when an employee is terminated if the employee is entitled to a public or private pension. The *Government Employees Compensation Act* incorporates the provisions of some provincial workers compensation legislation that provide benefits only to age 65, when a pension is payable. Other linkages between mandatory retirement and the availability of public pensions should be explored.
- The elimination of mandatory retirement policies may also increase the number of unjust dismissal complaints filed under the *Canada Labour Code.*
- Another concern is that mandatory retirement is needed to increase the number of jobs for younger Canadians. However, demographic trends do not support this hypothesis. First, most workers, where they have a choice, do not continue working past the age at which they are eligible for a full pension. Further, except for unique situations such as in universities, most job markets today are extremely fluid. Current demographics in Canada suggest that there will not be enough young workers to replace older ones, even if the latter choose to work for a longer period. These trends in the labour force should be studied.
- A similar concern is raised about the possibility that a larger number of members of traditionally advantaged groups will stay in their jobs, thereby reducing opportunities for members of other groups to obtain the more senior jobs.
- The need for retaining the skills of older workers should be studied.
- There should be continuing study of patterns of early retirement to see if they continue.
- There are certain sectors of the federally regulated work force that may wish to retain their compulsory retirement policies. The Canadian Forces is one of these. We have not had the time to evaluate the needs of such institutions. This deserves further study.

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The Principles That Should Apply in the Review

The Panel is of the view that the following equality issues should be kept in mind in the further study of this issue that it is recommending.

- Employers should not be able to justify forcing someone to retire simply because this has been the normal age for similar jobs. This is a very arbitrary approach that incorporates the types of historical assumptions that human rights legislation is supposed to eliminate. There must be sufficient flexibility to allow early retirement provisions for people who can retire comfortably at a certain age, while allowing others who cannot retire without financial hardship to continue to work.
- In the absence of blanket mandatory retirement defences in the Act, the government should require employers to justify their mandatory retirement policies with a *bona fide* occupational requirement.
- Just as the Supreme Court of Canada has found that the mandatory retirement practices of universities and hospitals have been justified, we believe that the government may be of the view that there are institutions or occupations with a special need for mandatory retirement that should be recognized without the need to go before a Tribunal to prove that there is a *bona fide* occupational requirement. Thus, the government may wish to consider the need to exempt certain institutions from having to justify mandatory retirement policies. But any exemptions should be examined carefully to ensure that there are no patterns of systemic discrimination in them. Obviously, these exemptions would have to be justified to withstand Charter challenges. One obvious source for such exceptions is Tribunal decisions that have found mandatory retirement in the institution to be justified.

Recommendations:

131. We recommend that the Minister recommend to her Cabinet colleagues a thorough review of the issue of mandatory retirement in the federal sector based on human rights principles and socio-economic factors, to determine whether mandatory retirement should be subject only to the *bona fide* occupational requirement or whether more specific defences should be crafted to allow for mandatory retirement in defined circumstances.

132. We recommend that there be no blanket defences for mandatory retirement.

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(b) Pensions and Insurance

Issue

The Act and its Regulations currently provide that certain distinctions in insurance and pension plans based on some grounds of discrimination cannot be the subject of a complaint. The Act also excepts from complaint public pension plans established by Parliament before the Act came into force in 1978.

The Panel considered whether the current approach should be changed.

The Legal Environment

Pension and insurance plans are regulated under human rights legislation because typically they make numerous distinctions based on prohibited grounds of discrimination to control risks that insurers and employers feel are necessary to limit costs to keep plans affordable.

Many of the distinctions made would be discriminatory violations other than the exceptions made in the Act and Regulations. There is currently no other defence in the Act that would allow an employer to justify a discriminatory term in a pension or insurance plan. The *bona fide* occupational requirement normally focuses on job requirements and not job benefits. The *bona fide* justification, which is somewhat broader in scope, does not apply in employment cases.

The insurance industry generally does not come within Parliament's jurisdiction under the division of powers between the federal Parliament and provincial legislatures in our Constitution, so the Act cannot regulate insurance directly. However, the pension plans offered by federal employers, developed by themselves or with their unions, do come within the coverage of the Act as employment benefits. Further, the terms of insurance plans offered to employees by federal employers, though likely purchased from provincially-regulated insurance companies, also are covered by the Act as employment benefits.

Public sector pension plans are usually found in Acts of Parliament. An example is the *Public Service Superannuation Act*.

Federal private sector plans are regulated by the *Pension Benefits Standards Act*, 1985 (PBSA). The PBSA was a modernization of the rules governing mostly federal private sector pensions. The provinces have similar legislation.

Approaches to Pension and Insurance Plans in Human Rights Legislation

Human rights legislation must deal with insurance and pension regulation very carefully. Insurance and pensions provide significant benefits to employees. If the Tribunal were to find that a term of insurance or pension coverage was discriminatory and not justified, there would have to be a modification of the insurance coverage or an amendment to the pension plan at a potentially higher cost (assuming that the insurance would even be available without the term), or the benefit would have to be eliminated in whole or in part.

Insurance plans and pensions are based on actuarial and other risk assumptions which may themselves need evaluation. There are two ways to assess whether the assumptions about people with certain personal characteristics are justifiable. The assumptions can be examined based on evidence of their validity at a Tribunal hearing. Or, the assumptions can be examined by officials in the process that establishes regulations that insulate certain distinctions from complaints.

This has led to two basic approaches to the human rights treatment of such distinctions. Human rights legislation usually deals with the distinctions made in pensions and insurance plans in one of these two ways, though often using a mixture of the two.

(i) A Special Defence

The first approach is to provide that distinctions on certain grounds of discrimination are not discriminatory if they are made in good faith and are reasonable.

The Supreme Court of Canada considered such a provision in the case of *Ontario Human Rights Commission v. Zurich Insurance* (1992), which dealt with the high cost of automobile insurance for young, single male drivers. The insurance company stated that their rates discriminated against young men on the basis of sex, age and marital status, but they argued that the rates were reasonable. A majority of the Court accepted this admission and then considered whether the insurers had established the defence. The majority of the judges agreed that as long as the insurer complied with industry practice and could prove that there was no practical alternative to the discriminatory distinctions at issue, the complaint should be dismissed. The Court issued a warning to insurers, however, that they should develop other options for the distinctions at issue.

The Court in the *Zurich* case recognized that insurance treats individuals on a statistical basis, unlike most

other cases of employment discrimination, because it is simply not possible to manage the risk determination function of insurance and pension plans on a truly individual basis.

However, in light of the concerns we have with systemic discrimination, we think that a full inquiry into the justification for making these distinctions is warranted. The habitual use of certain assumptions about people based on their personal characteristics is the very element that human rights legislation is intended to counter.

Where human rights legislation takes the approach of providing a separate defence, it often restricts the availability of the defence to distinctions on a limited number of grounds. For example, Saskatchewan limits such distinctions to age. Alberta adds marital status. Ontario's Code provides that distinctions on the grounds of age, sex, marital status or family status are not discriminatory if the pension or insurance plan complies with provincial employment standards legislation and regulations. Québec provides that distinctions in private and public pension and insurance plans based on age, sex or civil status are not discriminatory where such distinctions are "warranted" and the basis of the distinction is risk determination based on actuarial information.

An alternative would be simply to require an employer to defend any discriminatory distinction in insurance or pension plans using a defence that incorporates the elements of a principled defence to rights claims. Such a test could be developed based on a principled balancing of individual and respondent interests similar but not identical to the "reasonable limits" test under the Charter. The test would take into account the importance of the objective of the discriminatory act, the causal connection between the discriminatory act and its objective, the existence of practical but less discriminatory options to the discriminatory act, and the importance of the objective of the discriminatory act compared to the magnitude of the discrimination. This would be a higher test than the one established in the *Zurich* case because it would probe the validity of and the reasons for using an assumption more deeply than a test more focused on current practice.

This approach offers the advantage of allowing a Tribunal to balance the principle of equality without discrimination with the requirements of insurance and pension plan design and the benefits employees receive from insurance or pension protection. This adjudication would be based on the most up-to-date evidence from the employer and insurance industry on the need for the distinction and practical options to it. The Tribunal could then take into account various factors including the size of the company, the number of employees, the type of benefit at issue and the question of cost in deciding what the costs really were of including the individual or individuals excluded by the plan, alternatives available and whether the employer could bear that cost. The cost may or may not deter employers from providing the benefit. The claimant would likely be able to easily establish that a term of a pension or insurance plan created a potentially discriminatory distinction. This would likely be admitted by a respondent employer. The burden would then be on the employer to justify the distinction.

The special defence approach has the disadvantage of creating uncertainty about which terms in an insurance or pension plan can be justified under the new test. This approach might lead to more litigation, though there are currently very few human rights decisions dealing with the terms of pension and insurance plans. It is difficult to assess the effect this would have on the willingness of employers to provide pensions and insurance benefits to their employees. However, the existence of this approach in a number of provinces does not seem to have had any serious negative effects.

We think that the disadvantage of uncertainty could be alleviated by Commission policy on what would constitute acceptable distinctions in insurance and pension plans. The Manitoba Human Rights Commission has published an interpretive policy.

(ii) Creating a List of Exceptions

The other method for dealing with pensions and insurance benefits is to provide that certain specific distinctions described in the Act or Regulations cannot be the subject of a claim of discrimination. This is the current approach in the Act.

The Act itself provides specifically that compulsory vesting and locking-in of pension contributions at a fixed or determinable age in accordance with the PBSA is not a discriminatory practice. The Act also provides that it does not affect contributions and benefits accrued as of the date the Act came into force. The Act provides in section 22 that the Governor in Council may make regulations providing that the specified distinctions in pension and insurance plans cannot be the subject of a complaint under the Act. This power has

been used to pass the *Canadian Human Rights Benefit Regulations*. These Regulations create a list of distinctions that the Governor in Council has decreed to be acceptable. This means that the government has decided on the validity of the actuarial assumptions that underlie federal insurance and benefit plans.

This approach is used in Manitoba as well, although there are no regulations setting out acceptable distinctions. However, the Manitoba Human Rights Commission has published guidelines for employee benefit programs to assist employers, unions, insurers and beneficiaries.

The *Canadian Human Rights Act and Regulations* provide that certain distinctions on the basis of age, sex, marital and family status, and disability cannot be the subject of a complaint. Some age distinctions are allowed because pension benefits are normally available based on certain ages and also because from an actuarial point of view it is more costly to provide benefits for older persons. Marital and family status distinctions are allowed because the benefits provided to or with respect to the dependents of employees are considered important and socially useful, even though they are unavailable to single employees. Sex distinctions are listed because there are actuarial differences between men and women in calculating contributions and benefits. For example, historically, women live longer than men on average. This means that equal pension benefits would be more expensive for women than for men, because more money would have to be paid out. Disability distinctions have been accepted because of the statistical risks that some disabilities present, making certain benefits too expensive, in some cases prohibitively, for an employer.

The positive side of having the acceptable distinctions set out in the Act and Regulations is the certainty that it provides to employers and unions in the pension insurance plans they may wish to purchase for employees. The cost of these plans is much clearer.

The negative side of having a listing of acceptable distinctions is that it must be updated continually to ensure that it reflects the state of pension and insurance law and, more importantly, developments in the interpretation of the Charter and other human rights legislation. Provisions in the Act and Regulations that allow discriminatory distinctions can be found by the courts to contravene the Charter. Actuarial assumptions themselves may be discriminatory and would benefit from a Tribunal hearing.

Some Problems with the Current Act and Regulations

(i) General Pension Standards

The past record suggests it is unlikely that regulations will be kept up-to-date. The current Regulations were originally passed in 1980 and there have been four minor sets of amendments since then. However, it appears that they have not been brought into line with the PBSA. For example, section 3(a)(i) provides that a complaint cannot be filed about a pension plan to which employees do not make contributions, that does not permit employees under 25 to participate. This obviously creates a distinction based on age. However, section 14 of the PBSA since 1987 provides that full-time employees are entitled to become members of a plan after 24 months of continuous service. This means that it is probably not necessary to continue the age distinction. The principle in the Act to eliminate discrimination is best served by not allowing such a distinction.

Another example of this divergence arises from section 16(5) of the PBSA which requires a pension plan providing benefits based on an employee's period of employment or salary, to allow that employee to continue to pay in and build up benefits while employed after the pensionable age as long as the employee is not receiving a pension benefit, subject to a set maximum number of years of allowable contribution or maximum benefit. Section 3(a)(iii) of the Regulations under the Act, however, provides that a complaint cannot be laid if the plan precludes an employee who joined a plan too late to get a pension at the normal age of retirement from paying in after the normal age of retirement. This would seem to condone discrimination where it cannot be justified by current pension practice, as well as the requirements of equality without discrimination on the basis of age in section 15 of the Charter.

Further, section 4(e) of the Regulations provides that there cannot be a complaint about certain provisions in pension plans where benefits are different between male and female employees based on an actuarial distinction, that is, using the assumption that women live longer than men on average, and equal contributions paid out over a longer period provide a smaller monthly benefit. However, the PBSA, effective January 1, 1987, prohibits sex discrimination in contributions and benefits and allows for the use of unisex tables (however, this is subject to a little-used exception allowing for sex-based calculations when pension credits are transferred).

In each case, arguably, discriminatory distinctions may be perpetuated.

The Regulations have not been kept up-to-date even to remove the discrimination already eliminated by the PBSA.

(ii) The Definition of "Spouse"

There is a definition of "spouse" in the current Regulations that, taken together with the provisions that it is not discriminatory to provide benefits to dependents of employees, protects employers whose plans provide benefits not only to the married partner of an employee, but also to the opposite sex common law spouse described in the Regulations. However, the definition does not protect the employer who provides benefits to the same sex partner of an employee. This must be updated in line with the developments in the law under section 15 of the Charter concerning discrimination against same sex partners who do not receive the same benefits as opposite sex partners. Bill C-23, currently in the Senate, adds same sex spouses to federal statutes. This is clearly a factor that will have to be taken into account in the design of insurance and pension benefits in the federal sector in the future.

(iii) General Charter Issues

Further, the Regulations must be examined to see whether they comply with the Charter. We were not able to carry out this examination fully within our mandate since this would have required extensive and detailed research and consultation with employers and insurers to find out the rationale for each type of distinction and whether or not the pension or insurance benefit would be viable without this distinction. These consultations and analyses of each exception would have to be done should the government wish to continue to provide a list of acceptable distinctions on prohibited grounds of discrimination in the Act and Regulations.

Important Principles for Choosing an Option

The list of grounds on which an employer might base a justification, if any, should be as simple as possible.

There are some distinctions on grounds which are not now the basis of an exception such as those based on race, religion, colour, national or ethnic origin, even if actuarial data show an increased risk attached to them. Actuaries have likely never found it useful or necessary to base any of their assumptions on these grounds. The Panel has some concerns that risks associated with these grounds might possibly become factors in the design of insurance or pension coverage in the future. A uniform test for all actuarial assumptions might allow some distinctions on these grounds to be justified.

We would like to ensure that distinctions on these grounds continue to be prohibited, since they are now effectively prohibited in pension and insurance plans covered by the Regulations. However, it is difficult to find a principled reason for continuing this prohibition because it would create a kind of hierarchy of grounds in this area. Distinctions on some but not all grounds would be prohibited. We have concluded that the only way to deal with this concern is to require any distinction on a ground to be justified using the same test. This would be more consistent with the idea that any disadvantage based on a ground of discrimination involves the human dignity of individuals. Given the fact that pension and insurance plans have operated well in the past without any distinctions based on grounds such as race and religion, we think it is very unlikely that such distinctions could be justified on the basis of the test that we have proposed.

Consistent with the first approach described earlier, we recommend that all distinctions on any ground be justified according to the standard of the defence described requiring an evaluation of the actuarial assumptions underlying all of the distinctions.

Whatever the approach adopted, the Panel is of the view that an individual should not be refused employment because of an inability to become a member of a pension or insurance plan.

The Panel believes that the use of genetic information to predict an employee's susceptibility to a risk should be scrutinized in the same way as any distinction based on present disability. This is discussed in detail in chapter seventeen.

The Commission should provide guidance to employers, service providers, insurers and the public on equality issues in insurance and pension plans in the form of policy statements or Codes of Practice after consultation with all interested parties. This would provide a firm foundation for making decisions about appropriate insurance plans and pensions.

Pension Plans Established by Parliament

As noted earlier, section 62 of the Act currently provides that superannuation or pension plans established by Act of Parliament before March 1, 1978, the date the

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Act came into force, cannot be the subject of a complaint. This includes not only public plans such as the Canada Pension Plan, but also the employment pension plans of the federal government.

Section 62 was a transition provision to give the government time to ensure that these plans complied with the principles in the Act. The section also requires the Commission to keep these provisions under review and to report to Parliament on inconsistencies.

We do not see why these plans should continue to be excepted from the application of the Act. To do so perpetuates a distinction between private and public benefits. It is inconsistent with the quasi-constitutional nature of the values enshrined in the Act.

Retroactivity of Recommendations

A common practice when changes are made to pension rules is to provide that the rules apply only to contributions and benefits made or accrued after the rule change.

In this case, we are concerned that such exceptions should not take place automatically. The Act is meant to eliminate discrimination "within the purview of the Parliament of Canada", as stated in section 2 of the Act. It has been in force for a long time now. Pension plans should have already been brought into line with the Act. Thus, we recommend that the government examine any such continuation of a discriminatory rule to satisfy itself that there is no practical alternative to eliminating the discrimination, even if this were to place a cost burden on employers, including itself.

Recommendations:

134. We recommend that the Act require an employer to defend any discriminatory distinction in insurance or pension plans using a defence that incorporates the elements of a principled defence to rights claims. The test would take into account the importance of the objective of the discriminatory act, the causal connection between the discriminatory act and its objective, the existence of practical but less discriminatory options to the discriminatory act, and the importance of the objective of the discriminatory act compared to the magnitude of the discrimination.

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136. We recommend that the Commission provide guidance to employers, service providers, insurers and the public on equality issues in insurance and pension plans in the form of policy statements or Codes of Practice after consultation with all interested parties. This would provide a firm foundation for making decisions about appropriate insurance and pension plans.

137. We recommend elimination of the provision preventing claims about government pension plans established by statute before March 1, 1978.

138. We recommend that the Act not automatically provide that the changes in the approach to pension and insurance benefits take place only after such amendments have been made. Instead, the Minister should recommend to the government that any discrimination in pension or insurance plans that would be immunized because of a rule providing for the prospective operation of our recommendations should be justified.

139. We recommend that the practice when changes are made to pension rules to provide that the rules apply only to contributions and benefits made or accrued after the rule change not apply automatically when the changes we recommend are implemented.

140. We recommend that the government examine any continuation of a discriminatory benefit to satisfy itself that there is no practical alternative to eliminating the discrimination, even if this were to place a cost burden on employers, including itself.

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In this case, we are concerned that such exceptions should not take place automatically. The Act is meant to eliminate discrimination "within the purview of the Parliament of Canada", as stated in section 2 of the Act. It has been in force for a long time now. Pension plans should have already been brought into line with the Act. Thus, we recommend that the government examine any such continuation of a discriminatory rule to satisfy itself that there is no practical alternative to eliminating the discrimination, even if this were to place a cost burden on employers, including itself.

Recommendations:

134. We recommend that the Act require an employer to defend any discriminatory distinction in insurance or pension plans using a defence that incorporates the elements of a principled defence to rights claims. The test would take into account the importance of the objective of the discriminatory act, the causal connection between the discriminatory act and its objective, the existence of practical but less discriminatory options to the discriminatory act, and the importance of the objective of the discriminatory act compared to the magnitude of the discrimination.

135. We recommend that the Act provide that an individual should not be refused employment because of an inability to become a member of a pension or insurance plan.

136. We recommend that the Commission provide guidance to employers, service providers, insurers and the public on equality issues in insurance and pension plans in the form of policy statements or Codes of Practice after consultation with all interested parties. This would provide a firm foundation for making decisions about appropriate insurance and pension plans.

137. We recommend elimination of the provision preventing claims about government pension plans established by statute before March 1, 1978.

138. We recommend that the Act not automatically provide that the changes in the approach to pension and insurance benefits take place only after such amendments have been made. Instead, the Minister should recommend to the government that any discrimination in pension or insurance plans that would be immunized because of a rule providing for the prospective operation of our recommendations should be justified.

139. We recommend that the practice when changes are made to pension rules to provide that the rules apply only to contributions and benefits made or accrued after the rule change not apply automatically when the changes we recommend are implemented.

140. We recommend that the government examine any continuation of a discriminatory benefit to satisfy itself that there is no practical alternative to eliminating the discrimination, even if this were to place a cost burden on employers, including itself.

(c) The *Indian Act* Exception

The Issue

Section 67 of the Act currently provides that: "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."

The Panel must decide whether to recommend retaining section 67, repealing it or amending it to reflect a new policy which would, in part, have to reflect developments in Aboriginal self-government.

The Legal Environment

In the debates surrounding the adoption of the Act, the government of the day said that it wanted the section 67 exception while it was having discussions with Aboriginal people about amendments to the *Indian Act*. The government appears to have wanted a temporary measure in order to avoid challenges to potentially discriminatory provisions of the *Indian Act* in force at the time. The *Indian Act* was passed pursuant to Parliament's jurisdiction over "Indians, and Lands reserved for the Indians." It creates a regime with considerable control over many aspects of the lives of the Aboriginal people and communities that are subject to it, based on their Indian status. It gives powers to local Aboriginal governments called Band Councils to make by-laws and exercise other governmental powers on the reserves. These powers can affect those subject to them in many aspects of their daily lives. In 1969, the government issued a White Paper that envisioned the elimination of the *Indian Act* and full citizenship for Indians. However, the *Indian Act* remains in effect.

In 1982, the new *Constitution Act, 1982* gave constitutional recognition to Aboriginal and treaty rights. In 1984, in a case called *Guerin*, the Supreme Court of Canada established that the federal Crown acted in a fiduciary capacity when dealing with Indian lands.

One of the important issues when the Act was passed was the membership provisions of the *Indian Act* that defined who was or was not an "Indian" for the purposes of that Act. Specifically, these provisions took away this status from Indian women who married non-Indian men while giving this status to non-Indian women who married Indian men. Amendments to the *Indian Act* known as Bill C-31 were passed by Parliament effective April 17, 1985, the same date that section 15 of the Charter came into effect. Bill C-31 removed this status distinction between Indian men and women for marriages occurring after that date and gave control of Band membership to the Bands. Bill C-31 did not, however, end discrimination against the women and children who gained or regained Indian status.

A number of complaints were filed against Band Councils and the Department of Indian and Northern Affairs under the Act about this discrimination. In a number of cases, Tribunals determined that exclusions or differential treatment of women and their children based on the fact that they gained or regained status because of Bill C-31 amounted to discrimination based on sex and marital status. In some cases, Band Councils had placed a moratorium on certain services to these individuals in the period after Bill C-31 was passed while considering the issue of membership.

What Does Section 67 Mean?

Section 67 provides that nothing in the Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act either by Band Councils or the federal government. It also applies to by-laws made by Band Councils under the authority of the *Indian Act*. The *Indian Act* gives authority to Band Councils to make certain by-laws and decisions concerning the use and allotment of Reserve lands, maintenance of roads and bridges, general meetings, trespass on Reserve lands, contracts and expenditures of money. It also applies to actions taken by the Band Councils or the federal government authorized by the *Indian Act*.

Section 67 could have been interpreted as a bar against complaints about any matter governed by the *Indian Act*, whether it was about an act of the Department of Indian and Northern Affairs, another Department or an act or by-law of a Band Council. The courts and Tribunals, however, have been careful to interpret this provision narrowly, in keeping with a well-established rule for exceptions to human rights legislation. In 1989, in *Re Desjarlais*, the Federal Court of Appeal held that the Act does apply to the actions of Band Councils that are not based on a provision of the *Indian Act* or on rules made under authority of that Act, such as Band by-laws.

Section 67 is the only exception in the Act that affects individuals mainly on the basis of race. Moreover, it prevents not only status Indians from making a complaint about discrimination authorized under the *Indian Act*, but also their families (if not given status), other Aboriginal people, Inuit, Métis, and anyone else who might wish to challenge any matter authorized by that Act.

Section 67 also prevents non-Indians (including non-status Aboriginal people, Inuit and Métis) from challenging the benefits provided under the *Indian Act* to status Indians.

What Defence Would Apply if Section 67 Were Removed?

In cases where section 67 does not apply, the regular defences in the Act would apply. A recent case demonstrates how the *bona fide* justification works in this context.

In *Jacobs v. Mohawk Council of Khanawake* (1998), a Canadian Human Rights Tribunal held that it was discriminatory to deny services to Peter Jacobs and his wife because of the membership rules that were adopted by the Mohawk government. Peter Jacobs had been adopted into the Mohawk community as a child and had been raised in the Mohawk culture, language and way of life, but was refused governmental services because he was not at least 50% Mohawk. His wife, Trudy, a Mohawk woman, lost her membership because the membership rules said that a Mohawk loses membership on marriage to a non-Mohawk.

The Tribunal found this to be discriminatory. It held that the Mohawks had fulfilled the "good faith" component of the *bona fide* justification test because the membership rules were based on the "sincere belief that these criteria were necessary in order to ensure the survival of Khanawake as a culturally distinct Mohawk community and in order to protect its limited land base." However, the Tribunal found that the Mohawks failed to show that it was "reasonably necessary" as required by the objective component of the *bona fide* justification at the time, to refuse these services to Peter Jacobs and his wife.

It is important to note that the Tribunal did say that actions taken to ensure the survival of an Aboriginal community's culture, language and land base could come within the meaning of a *bona fide* justification. In this case, however, it found the rules simply went too far in failing to ensure services to two people who were very closely connected to the Mohawk community. (The Tribunal also found that some actions of the Mohawk government were insulated from the Act by section 67 because of the acceptance of certain election regulations by order of the Minister of Indian Affairs.)

Inconsistency in the Application of the Act Created by Section 67

This interpretation of the Act leads to inconsistency in the application of the Act depending on whether the specific action complained about is authorized by the *Indian Act* or a rule made under it. The courts have tended to resolve any doubt about whether an act or omission of the Department or a Band Council was authorized by the *Indian Act* in favour of the complainant.

The fact that an action by a Band Council might be the subject of a complaint depending on whether or not the Council had authorized it through a by-law means that the Council itself, the alleged discriminator, would determine whether section 67 applies. The Panel believes this is an arbitrary way of dealing with the application of the Act. Section 67 prevents an act or omission that might otherwise be found to be discriminatory from being subjected to justification. Assuming one of the purposes of section 67 is to prevent non-Indians who might be unconnected to an Indian community from obtaining services from a Band Council or a First Nation Government, it goes too far in preventing complaints from members of the communities themselves about their government.

Self-Government Agreements Where the *Indian Act* Does Not Apply

The Government's current policy of negotiating self-government agreements will have an impact on the section 67 issue as well.

Many of these agreements are meant to replace the *Indian Act* and to give considerable powers of self-government to First Nations. With the removal of the *Indian Act*, section 67 is irrelevant. These agreements usually do not deal specifically with the issue of the application of the Act.

These developments raise the issue of the extent to which section 67 should be continued or amended. Some First Nation governments and Band Councils would be immunized when acting with authorization under the *Indian Act*. Other First Nation governments, acting under the authority of self-government agreements and not the *Indian Act*, would not be immunized.

Consultations and Submissions

Any effort to deal with the section 67 issue must ensure adequate input from Aboriginal people themselves. In the course of our consultations, we attempted to contact many Bands and Aboriginal organizations. A

number of Aboriginal people, representing many different national and regional organizations, attended our consultations held across Canada and many sent in written submissions with their views. The Panel also commissioned a number of research papers by Aboriginal individuals and organizations.

This issue has important implications for the Aboriginal peoples of Canada. Some participants expressed concern about the treatment of individuals who regained their Indian status under Bill C-31 by Band Councils that had not been favourable to that policy for a number of reasons including the potential impact on Band resources. Non-status Aboriginal people were concerned about programs and services provided on-reserve to status Indians and in which they were not allowed to participate. Status Indians living off-reserve had complaints about decisions affecting them that were made by the federal government and Band Councils.

Some Aboriginal people complained about federal programs and services that use status or residence on reserve as the basis for entitlement. They identified three programs in particular: Human Resources and Development Canada's Aboriginal Human Resources Development Strategy; the Department of Indian and Northern Affairs' (DIAND) post-secondary education program; and Health Canada's non-insured health protection program.

Other Aboriginal representatives consulted stated that status under the *Indian Act* is often used to limit non-status access to Aboriginal rights protected by section 35 of the *Constitution Act*, 1982. There were calls for adding new grounds to the Act to deal with specific aspects of the discrimination against Aboriginal people living off-reserve.

The New Brunswick Aboriginal Peoples Council called for the addition of the ground of "Aboriginality-residence," recently found to be a ground analogous to those listed in section 15 of the Charter in the 1999 Supreme Court of Canada decision in *Corbiere*. They believed that discrimination on the basis of Indian status under the *Indian Act* in access to programs and services should be stopped, unless there were rational reasons for it. It is their view that there should be no discriminatory treatment in programs for those who are Aboriginal but not members of a particular Band. The Council also believes that political association with a national Aboriginal organization or Band Council in charge of administering a program should not be a sole ground for eligibility to access certain federal programs. They submitted that these grounds should be added in a special provision dealing with discrimination against Aboriginal people.

Officials representing DIAND noted the concerns about gender discrimination voiced by Aboriginal women. Only 87 of 610 Chiefs in Canada are women. Lifting section 67 would open new redress procedures, but might lead to retaliation against claimants and extra costs for Aboriginal governments called on to defend their actions. A period of transition might be required in order to review their practices. New litigation against the Department might have an adverse effect on resources available for Aboriginal programs. The Department noted the concerns about potential conflict between individual and collective values. The First Nations could develop their own human rights legislation to deal with this or the Act could be amended to better reflect the balance between the two approaches. The Department was concerned about claims brought by non-Band members for Band services. They stressed that Aboriginal people, especially women, will need to be educated about asserting their rights. DIAND officials noted that enforcement of Tribunal orders could pose special problems on Reserves. The Department suggested that special exceptions might be needed to allow Aboriginal governments to provide services and benefits on a preferential basis to their members.

The Panel heard a number of arguments against the application of the Act to Aboriginal governing bodies. Some, for example the Mohawks of Kahnawake, argued that the Act imposes non-Aboriginal values on the Aboriginal people of Canada. They have said that the emphasis in the Act on the rights of the individual against the community is foreign to the values of the Aboriginal peoples of Canada that emphasize the importance of the relationships that form their communities over the interests of the individual member. They argue that the imposition of foreign values in the Act undermines the whole idea of Aboriginal self-government and the sovereignty of First Nations. Many feel that First Nation governments should be the ones to determine the way that equality without discrimination should be established in Aboriginal communities. Others believed that Aboriginal governments were not democratic. All the groups representing Aboriginal women asked for the repeal of this exception so that they could benefit from the protection of the Act.

"...Well, First Nations want to have their own government but we, the women, are afraid of not being included, that there won't be any equity between men and women. We are afraid that this will not be provided in the Canadian Act. It is part of you but it is not part of us. We are afraid of being excluded. We have been thinking about this since 1985. We already had dealings with the Commission before we recovered our rights. We met with the Human Rights Commission, but they could do nothing for us because the *Indian Act* is separate from the Canadian Act. I don't know whether at the time, at this time, the Human Rights Commission could have enough strength if we were to need your assistance, whether if our independent government excludes us, whether we could turn to you for assistance, whether you would support us. It's a question I'm asking. It is not done, I mean some determination is not there, but we're talking about having a Charter for independent Native government..." (Evelyn O'Bomsawin)

"On balance, then, it may be said that the rationale of protecting the *Indian Act* system from destruction at the hands of privileged non-Aboriginal persons who do not wish to recognize the distinctiveness of Indian culture is greatly overwhelmed by the invidious effect of section 67 in protecting from examination the systemic racism of the Act." (Native Women's Association of Canada)

"...That section proclaims that the Government of Canada and the government's creations, the Band Councils, are permitted to discriminate at will against Aboriginal people on the basis of race, gender, and other characteristics, as long as their discrimination has a formal connection to the *Indian Act*. It proclaims that Aboriginal people are entitled to less protection of their human dignity than are other Canadians." (Native Women's Association of Canada)

The Royal Commission on Aboriginal People recommended in its Report that the *Canadian Human Rights Act* should be amended to authorize the Canadian Human Rights Commission to hold hearings into the past practice of relocating Aboriginal communities and to recommend a range of forward-looking remedies designed to assist Aboriginal people in rebuilding their communities. It said that there should be funding for Aboriginal communities who wish to take such a claim before the Commission. Funding would be decided by an independent panel of advisors established by the Commission under the Act. The Commission would have to finish this work in fifteen years.

Should Section 67 be Retained, Modified or Repealed?

The Panel studied various options for resolving this issue, including whether or not section 67 should be maintained, modified or repealed. We considered the need for a provision to provide a balance between individual and collective rights. We also considered the possibility of a separate Aboriginal human rights regime and the need for a transitional period if section 67 is repealed.

In the Panel's view, the Act must reflect truly universal values that have been accepted internationally. We believe that all Canadians, Aboriginal and non-Aboriginal alike, have a right to equality without discrimination. And, to exclude Aboriginal people from the protection provided against discrimination by the Act to all individuals in Canada — assuming that the revised Act would extend to protect all persons present in Canada, whether lawfully or not — is not appropriate. The cases and consultations demonstrate a need for the application of the Act to matters of Aboriginal government. At the same time, the Act should permit a balancing of the values of the Aboriginal people and the need to preserve Aboriginal culture. Further, to the extent that Aboriginal communities have inherited the problems with the modern State that are remedied by human rights legislation, they should be able to use this legislation to seek relief.

The Panel concludes, therefore, that a blanket exception like section 67 is not appropriate. It is inconsistent with the spirit behind Bill C-31.

New Grounds

Some of the organizations we consulted suggested that additional grounds be added to the Act to deal with specific kinds of discrimination suffered by Aboriginal people. These included Aboriginal-residence, that is, whether or not a person lives on a Reserve. Another was C-31 status, that is, the status of a person reinstated by Bill C-31. Another was the ground of Indian status itself.

These points raise huge questions about the social and economic structure of Aboriginal life and its legal underpinnings. Such matters deserve far more study than we have been able to give them. We will have to content ourselves with dealing with the question that we were asked in the Review and leave these for a much broader study. The Commission could study these matters as it obtains greater jurisdiction in the Aboriginal

area with the removal of section 67 and as it develops its capacity to study and comment on serious issues of disadvantage and discrimination in our society today.

A New Balancing Provision

The Panel believes it is highly important to balance the interests of Aboriginal individuals seeking equality without discrimination with important Aboriginal community interests. A balancing provision means that a Tribunal would actually hear evidence and representations on the issue of whether the interests of the individual and the community are properly balanced. This type of provision is much better tailored to upholding the values enshrined in the Act, than simply excepting an entire area of government action from the Act.

What Kind of Balancing Provision is Needed?

Currently, the way to ensure the right of individuals to be free of discrimination in services provided by governments, among others, is to show a *bona fide* justification for the action.

The *Jacobs* case described above considered the *bona fide* justification defence and showed that it can be used to balance the concerns of individual and collective interests. The *bona fide* justification provision was amended in June, 1998, after *Jacobs*, to require a respondent to prove not just the subjective and objective elements of the old test, but also that accommodation of individuals or classes of individuals was not possible without undue hardship. Undue hardship is assessed in terms of cost, health and safety. The addition of a duty to accommodate might not favour an Aboriginal government if it had to show that it had tried to accommodate non-Aboriginal individuals, because the concept of accommodation is aimed at reducing exclusions. It may be that something more is needed to focus the inquiry on the needs of the Aboriginal community.

A Balancing Provision Like Section 25 of the Charter?

The Panel considered modeling a provision on section 25 of the Charter. Some argue that this is a complete insulation of Aboriginal rights from the Charter, though the courts have not yet decided what it means. However, the rule is generally that no rights are absolute and it is possible that section 25 will be interpreted to allow for the balancing of Charter rights and Aboriginal, treaty and "other rights", whatever the courts might find this last expression to include.

Also, the government that passed section 67 might also have been concerned that conflicts between the Act and the *Indian Act* would result in nullifying parts of the *Indian Act*. However, that fear must be put in post-Charter perspective. An equality claim could be made under the Charter to the same effect. Further, the scope of the Act is much narrower than the Charter, because it is limited to employment and services. Its impact, even taking into account the primacy concept, would be narrow. However, a balancing clause could recognize the existence of the *Indian Act* as a general part of the current Aboriginal context and reduce the chance of conflict.

A "section 25-type" provision would provide Aboriginal governments with a balancing provision familiar to them in the Charter context, which would expressly recognize the primacy of Aboriginal, treaty and "other" rights over the rights in the Act. However, the First Nation government would have the onerous burden of proving an Aboriginal right in each case.

This was the solution to the section 67 issue proposed in Bill C-108, the amendment bill tabled by the government of the day in 1992.

However, it is unlikely that such a provision is needed because the right to equality in the Act, a statute of Parliament even with quasi-constitutional status, could not override constitutionally protected Aboriginal or treaty rights in any event, unless they could be justified by the *Sparrow* test. The *Sparrow* test requires the Crown to prove that legislation that infringes an Aboriginal or treaty right has a valid legislative objective, that the legislation is rationally connected to the objective and affects the right as little as possible. This would apply to self-government agreements established by treaty as well. First Nations with self-government agreements without constitutional status might not benefit from a "section 25-type" provision, because their agreements would not confer treaty rights. They would, however, be able to rely on any Aboriginal rights they could establish.

Further, if the "other rights" referred to in section 25 of the Charter include rights under the *Indian Act*, including the power of Band Councils to pass by-laws, then the addition of a "section 25-type" clause may have the same effect as section 67.

In summary, such a provision could be difficult to interpret and apply and might not achieve its objectives.

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An Interpretive Provision Requiring Rights to be Interpreted in a Way That is Consistent with Aboriginal Culture?

Another type of balancing provision may be better tailored to this situation. This is not because we disagree with the purpose of section 25, but rather because we do not feel that it is necessary and may be inappropriate in the context of the Act.

We think that an interpretative provision should be added to the Act that requires the taking into account of Aboriginal community needs and aspirations in interpreting and applying rights and defences in cases involving employment and services provided by Aboriginal governmental organizations.

This would supplement the *bona fide* justification argument, ensuring that it is properly adapted to the needs of Aboriginal government, without binding the Tribunal to any one interpretation. This is consistent with the *Draft Declaration on the Rights of Indigenous People* that requires that States take measures to assist Indigenous people to protect their cultures, languages and traditions. It is also consistent with the policy underlying similar, though smaller scale exceptions in provincial human rights legislation that allow organizations that serve certain religious or ethnic communities to give employment and other preferences to members of their group where there is a *bona fide* occupational requirement. This type of balancing can be seen in the 1984 case *Caldwell v. Stuart*. In this case the Supreme Court of Canada held that it was a *bona fide* occupational requirement to allow a Roman Catholic school to refuse to continue the employment of a teacher who had breached principles of the faith. The Court found that it was reasonably necessary to the effective operation of a Roman Catholic school to require that the teachers adhere to the faith as an example to the students of the lifestyle they were teaching.

The balancing clause should be sufficient to defeat a claim by an individual, who is unconnected with the community, for services provided by a Band Council or First Nation government to members of the community. It should also support reasonable preferences in services and employment.

As a last point, we are of the view that the balancing clause should not justify sex discrimination or be used to perpetuate the historic inequalities created by the *Indian Act*. This is a value stated in section 35(4) of the *Constitution Act*, 1982, Schedule B, that applies to Aboriginal and treaty rights themselves. Nor should it be used to condone other forms of discrimination in Aboriginal communities.

The Need to Provide for Future Aboriginal Human Rights Codes

The Panel believes something more should be done in order to ensure a greater say in the human rights rules that apply to Aboriginal governments. This would be consistent with the principle of self-government.

We think the Act should provide that Aboriginal governments, locally or regionally or nationally, could create their own human rights law, in keeping with Aboriginal values. The federal and Aboriginal governments could negotiate the conditions in which the Aboriginal human rights laws take over from the Act and the basic standards that Aboriginal legislation should meet.

There is precedent for this in the Act now. The Act provides that it applies to the Crown in right of Canada, though subject to exceptions for the territorial governments. Each exception has to be proclaimed in order to come into effect. The exception was proclaimed for the Yukon when it enacted a comprehensive human rights act. This would provide a way to work together in the spirit of the *Statement of Reconciliation*.

Recommendations:

141. We recommend that section 67 be removed from the Act so that the Act applies to the federal government and Aboriginal governments. We recommend that the Minister of Justice ensure that the Act applies to self-governing Aboriginal communities until such time as an Aboriginal human rights code applies, as agreed by the Federal and First Nations governments.

142. We recommend that an interpretative provision be incorporated in the Act to ensure that Aboriginal community needs and aspirations are taken into account in interpreting the rights and defences in the Act in cases involving employment and services provided by Aboriginal governmental organizations. Such a provision would ensure an appropriate balance between individual rights and Aboriginal community interests. It should operate to aid in interpreting the existing justifications in the Act and not as a new justification that would undermine the achievement of equality.

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(d) Hate Messages

Issue

The Panel was asked to consider the question of whether the Act should expressly prohibit hate messages on the Internet in addition to its current coverage of federal telecommunications systems.

The Legal Environment

Section 13(1) of the Act was passed in 1977 to prohibit a person, or groups of persons acting together, to communicate telephonically or cause the repeated communication of any matter likely to expose individuals identifiable by the listed grounds of discrimination to hatred or contempt using the telephone or any other telecommunications system within federal jurisdiction. This prohibition of discrimination was meant to fit with the other schemes for the regulation of broadcasting in Canada by providing that section 13 does not apply when the matter is communicated by a broadcast facility. Another exception provides that the owner or operator of a telecommunications facility on which such matters are telecommunicated is not liable under the Act based simply on the use of their facilities.

Broadcasting generally comes within the jurisdiction of the Canadian Radio Telecommunications Commission under the *Broadcasting Act*. There are regulations under the *Broadcasting Act* prohibiting discriminatory representations of persons based on most of the grounds in the Act.

The *Canadian Human Rights Act* was amended in June, 1998 to provide that if a Tribunal were to find a complaint based on section 13 to be substantiated, it could make an order that the individual responsible for the hate message cease communicating it and take measures to redress the practice or prevent the same or similar practice from occurring in the future. The Tribunal can currently order compensation of up to $20,000 for a victim who is specifically singled out in the hate message where the communicator acted willfully or recklessly. The Tribunal can also order a penalty of up to $10,000.

There have been a number of Tribunal decisions on this provision that have resulted in orders prohibiting hate messages.

Consultations and Submissions

Here are a few samples of the submissions we received on this subject:

"The compliance for broadcast standards should continue to remain within the jurisdiction of the CRTC and the owners of telecommunications facilities. These service providers should not be responsible for the content being transmitted by persons not under their control such as Internet users as has been found by the CRTC more recently." (Rogers Communications)

"Like all new technologies, the Internet has been a force for both good and evil. Those with malevolent aims have readily adopted it (i) to disseminate hatred through their many web-sites, chat rooms and LISTSERV's and (ii) to communicate with one another instantly across national and international boundaries for support, information sharing and recruitment. Although web-sites may not originate in Canada, many of their recruits as well as their victims surely live here..."

"Operators or owners of telecommunications facilities under the CHRA should bear some liability for the use of their facilities by persons communicating hate messages. Internet Service Providers, for example, should not merely be passive transmitters of information; they must be accountable in some measure for the material flowing through their service and they should monitor it..."

"Notwithstanding the difficulties posed by the technology, some federal body with adequate human and financial resources must be charged with keeping anti-Semitism, racism and other social pathologies off the Net. The CHRC is a logical choice..." (Canadian Jewish Congress)

"[We] believe that hate messages and the dissemination of hate is a growing problem for human rights bodies, and national and international governments. [We] agree with the Canadian Jewish Congress and other groups that we need to rethink key concepts in this area such as *telecommunications* and *broadcasting* because they are out of date. The language in this area needs to be flexible enough to regulate new mediums of communication and keep them free from hate." (Affiliation of Multicultural Societies & Service Agencies of British Columbia)

"Several years ago [we] issued the wake-up call to all Canadians that the Internet was quickly becoming a tool that provided hate mongers a degree of influence that far outweighed their numbers.[...] They are masterful at insinuating their programs of anti-Semitism, Holocaust denial and racial superiority into the mainstream of a youth-dominated culture. Any child with access to a computer has access to hate.[...] The rise in [hate] crimes has been linked by League officials, corroborated by police and criminologists, to the increased viciousness of hate through telecommunications media, most notably the Internet..."

"A detailed section of the Act, identifying the responsibilities of parties involved in the transmission of hate messages and the process for complaint and resolutions needs to be developed, particularly with respect to hate messages over the Internet.[...] We recommend that, at minimum, section 13 of the Act be amended to define more explicitly the term "telecommunications undertaking" to encompass the Internet, including but not limited to the World Wide Web, Usenet, E-mail, Chat Rooms, etc., and other specific uses of telecommunications devices.[...] Furthermore, the wording should be sufficiently broadened to include any future technological advancements which might allow for the transmission of hate mail, literature, messages and propaganda, over an as-yet-unknowable medium, so that the Commission will be in a position to deal with them." (League for Human Rights of B'nai Brith Canada)

Regulation of the Internet

The Canadian Radio and Telecommunications Commission announced in May, 1999 that it would not regulate the Internet even though some of the aspects of the Internet might otherwise come within the *Broadcasting Act*. The CRTC made its decision after receiving numerous submissions from the industry which largely sought self-regulation, and from groups who were the subject of hate messages who asked for something to be done.

Discussion

There is a significant amount of evidence that the Internet is being used to communicate hate messages of the kind prohibited by section 13 of the Act. The Internet is unlike the telephonic communication of hate in at least two ways that are relevant to the issue before us.

First, Internet technologies provide a much more powerful means of promulgating hate messages. The messages can be much more expressive in the multimedia world of the Internet. They can be accessed by mass audiences with much less effort than messages communicated over the telephone.

Second, the Internet has increased the ability of those who wish to disseminate hate messages to find each other and mobilize their efforts. This has been recognized by anti-hate groups as well as those who wish to communicate this kind of message. The telephone hate message communicator might be acting alone or in a very small group. The telephone system is more limited in its capacity to find other like-minded individuals. However, hate communicators on the Internet can use the medium to find others to form a critical mass for their activities. Groups that are the traditional targets of hate messages are concerned that the increase of hate on the Internet has coincided with an increase in hate crimes, a lowering of the age of those who commit such crimes, and the spread of such crimes to the suburbs. Further, unlike telephone lines, Internet technology allows for involuntary or inadvertent access to sites that are communicating hate messages while carrying out thematic research for example. Also, the Internet allows for a person to send mass unsolicited hate messages to general users and to the groups targeted by these messages.

The question of whether section 13 covers the Internet has not been decided by the Tribunal or the courts.

We are of the view that there is ample reason to extend the prohibition in section 13 to Internet technologies and other technologies that may evolve.

Freedom of Expression

We are concerned, however, about a number of issues arising from this viewpoint.

Perhaps the first question is whether this regulation of the content of communication is consistent with the freedom of expression protected by the Charter.

In 1990 the Supreme Court of Canada dealt with this issue in *Canadian Human Rights Commission v. Taylor*. A Tribunal under the Act found Taylor liable for hate messages contrary to section 13. When he was committed for contempt of the Tribunal Order, he challenged section 13 as an unconstitutional infringement of his freedom of expression. Chief Justice Dickson held that

section 13(1) was a reasonable limit on freedom of expression justified in a free and democratic society and did not violate the Charter. He wrote that there was an important objective for section 13. "It can thus be concluded that messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multi-cultural society which is committed to the idea of equality."

Chief Justice Dickson found other elements required to demonstrate that section 13(1) was a reasonable limit. Parliament had tailored the prohibition to meet its objective. The Act prohibited only extreme hatred and contempt which was clearly antithetical to its purposes. Further, the use of the term "repeated" to describe the proscribed hate messages focused the prohibition on the public, larger scale schemes for the dissemination of hate propaganda which most threatened the "admirable aim underlying the Act." He rejected an argument that the Charter required that the Crown had to prove that the respondent had to intend to communicate hate messages before being liable under the Act, because the general concern in human rights legislation is with the effects of acts rather than whether they were intended. A discriminatory act is just as hurtful if unintended as if intended. Further, the Court also held that the Charter did not require the Act to provide a defence of truth to persons alleged to have disseminated hate messages. A truthful statement in this context is just as damaging as an untruthful one.

We believe that the communication of hate messages by the Internet is just the kind of public and large-scale scheme for the dissemination of hatred that would come within the scope of the Supreme Court of Canada's ruling.

During our cross-country consultations, we were asked to consider whether 'hate' or 'hate messages' should be defined in the Act. We do not recommend that these terms be defined in the Act. The Supreme Court has already interpreted their meaning in a manner consistent with the Charter and the principles and purpose of the Act, and ruled that the terms "provide a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity." If these terms were defined, the section might lose some of its reach.

Liability of Organizations Providing Access to the Internet

There is a second question about the liability of access/service providers that provide access to the Internet to individuals who transmit hate messages through their systems. Organizations could be involved in complaint proceedings. A claim against one of their subscribers who used the Internet to disseminate hate messages could be expanded to add the access/service provider as a party.

The Tribunal should be given the power to order the access/service provider to refuse to or cease to provide further access to the Internet to a person that the Tribunal had found to have engaged in this discriminatory practice to the extent necessary to prevent future dissemination of such information and to the extent that denial of such access is technologically feasible.

Additionally, the access/service provider could be found liable itself to the extent that it knew or should have known that its facilities were being used to disseminate hate messages. This is the basis on which some courts have held access/service providers liable for defamatory messages on their facilities. The extent of this liability should reflect the degree of knowledge that the access/service provider has and their technological ability to do something about it. Access/service providers perform a range of services for their customers. The extent of their liability may have to be determined on a case by case basis taking into account the type of control that they have over their locations. The nature of the remedy should be flexible to allow the Tribunal to prevent the discriminatory practice from recurring, realizing that there are limits to the available technology and also taking into account that private communications should remain private, and that an individual should not be completely cut off from Internet access for private and non-hate-disseminating activities.

We considered whether this degree of liability runs contrary to the policy in the Act that provides that the owner or operator of a telecommunications undertaking is not liable merely because its facilities are being used. We do not think it does. The proposal of liability is based on more than the passive provision of facilities for disseminating hate messages. It would require knowledge, actual or constructive, that its facilities were being used for a breach of the Act.

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Broadcasting and other telecommunications facilities are regulated by the CRTC. The Internet is not. The power of the Internet to disseminate hate and to allow the mobilization of groups with this intention justifies a greater responsibility on persons who can assist in combating this kind of activity. It is all the more important to use the Act to deal with this issue, when no one else regulates hate on the Internet.

The Commission should develop policies and even Codes of Practice with interested persons, businesses and organizations to provide guidance on the requirements of the Act and the scope of private communications that would not be subject to the prohibition against hate messages. The Supreme Court of Canada has already provided guidance on the meaning of the repeated communication of hate messages to help separate the public communication of hate messages from the purely private.

Internet and computer technology are evolving so quickly that superior, but as yet unknown, capabilities will likely surpass current ones in the near future. The Panel believes that, to the extent possible, the prohibition against hate messages in the Act should be broadened to encompass both existing and future technologies.

Agreements between individuals and access/service providers that provide access to the Internet should include an undertaking not to breach the Act.

Recommendations:

143. We recommend that, to the extent that it is possible, the prohibition of hate messages in the Act be broadened to encompass both existing and future telecommunications technologies in federal jurisdiction.

144. We recommend that the Tribunal be given the power to order an Internet access/service provider to refuse or cease to provide access to the Internet to a person found to have engaged in this discriminatory practice. This would be subject to the Tribunal being able to tailor such an order to respect private communications and to the technological ability of access/service providers to comply with such an order.

145. We recommend that the access/service provider should be found liable itself to the extent that it knew or should have known that its facilities were being used to disseminate hate messages, based on the extent of its knowledge and technological ability to take measures to prevent future breaches of the Act.

146. We recommend that the Commission develop policies and Codes of Practice with interested persons to provide guidance on the requirements of the Act and the scope of private communications that should not be subject to the prohibition against hate messages.

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CHAPTER 19
Other Issues

(a) Who is a Person Affected by a Breach of the Act?

Issue

The Act refers to the "victim" of a discriminatory practice without defining the term. However, it does place some limits on who may complain about an act of discrimination depending on where the act occurred and the person's immigration status. This partially describes who is a "victim" for the purpose of filing a complaint. The question is whether these limits are still appropriate.

This section should be read in parallel with the chapter fourteen 'Who May File a Claim'.

The Act

The Act provides that if the alleged discrimination took place in Canada, then only victims who are lawfully present in Canada may file a complaint about it. Further, if the victim was temporarily absent from Canada when the alleged discrimination occurred, then he or she may file a complaint only if entitled to return to Canada. The Department of Citizenship and Immigration advised the Panel that the *Immigration Act* recognizes the right of Canadian citizens, permanent residents, convention refugees and registered Indians to come into or remain in Canada.

Further, the Act provides that if the alleged discrimination took place outside Canada, then the victim can file a complaint only if he or she was a Canadian citizen or a permanent resident. The Minister of Citizenship and Immigration is authorized by the Act to determine the victim's immigration status.

Consultations and Submissions

Many groups felt everyone who is physically present in Canada should be able to complain about discrimination that they have suffered. Everyone present should be entitled to their human rights under the Act.

The Department of Immigration and Citizenship was concerned that giving the right to those unlawfully present in Canada, that is, those who had overstayed their visas, who were in detention awaiting removal, or who were in penal institutions serving sentences prior to removal, for example, could lead to the use of the human rights system to undermine immigration enforcement. The Department thought that this would be inappropriate. The same argument was raised for those in the refugee determination process prior to determination of their status. The Department wished to ensure that the Act could not be used to affect immigration status, particularly, to stay a removal order, to override a decision made under the *Immigration Act* or to obtain immigration status as a remedy. It suggested that the Minister of Citizenship and Immigration should continue to determine immigration status for the purpose of filing a complaint. The Department noted that there have been human rights cases under the Act that have determined that a sponsor, a person arranging for a relative to visit Canada, either a Canadian citizen or permanent immigrant, may file a complaint in Canada alleging discrimination in the denial of a visa abroad. The Department suggested that if the Panel was considering expressly allowing such complaints, the recommendation should be accompanied by a strict definition of who is the victim, in addition to incorporating the suggestions made previously concerning stays of the removal process and the grant of status as a remedy. Further, the Department was of the view that allowing foreign nationals to file complaints abroad would result in the Commission supervising immigration policy abroad and would leave the Department in a difficult position because the million or so visa applications each year could not be defended without serious immigration processing delays and prohibitive costs. It also felt that this would cause delays in the human rights process. The Department cited the extensive appeal and review processes under the *Immigration Act* as being sufficient to ensure proper treatment.

The Panel's View

The Panel agrees that human rights protection should be available to all individuals present in Canada. But, in our view, this includes those who are not lawfully present. These individuals are still entitled to the dignity of the equality ensured by the Act. They are covered by the equality provisions of the Charter. At the same time, however, the human rights process should not become part of the immigration process. Both have their own objectives and systems.

To prevent conflict with the immigration system, which is based on the idea that a State has the right and duty to its citizens to determine who can come in to stay, the Panel believes an individual should not be able to obtain a stay of removal proceedings because human rights proceedings are in progress. Nor do we believe that the Tribunal should be able to grant immigration status. Further, for claims concerning a breach of the Act in the immigration process, we think that the principles discussed in chapter thirteen should apply.

The Minister of Citizenship and Immigration should continue to determine an individual's immigration status for the purposes of the Act. The Minister controls the records that help determine this issue and has the expertise necessary to make the decision. The Tribunal should not become clogged with determinations of pure immigration matters. It will be busy enough with its own new claims process.

The Panel is of the view that the current restrictions on the right of individuals who are not Canadian citizens or permanent residents to file claims about events occurring outside Canada should remain. An influx of claims from around the world could severely overburden the new process that we are recommending. We have taken into account the fact that the immigration process already contains rights of appeal and review for those denied visas outside Canada.

However, the Tribunal has interpreted the Act to allow an individual to file a complaint alleging discrimination in the refusal of a sponsorship application even though the individual being sponsored is not a citizen and the denial took place outside Canada. This same interpretation allowed another citizen complainant to allege discrimination in the denial of a visitor's visa outside Canada to a non-citizen. We believe this interpretation should not be changed as it is based on the Federal Court of Appeal's decision in the 1988 *Re Singh* case. The Court held that a "victim" for the purpose of the current Act might be someone who has suffered direct and serious consequences as a result of a discriminatory act, which is a question of fact to be determined in the circumstances.

The Panel believes that issues of systemic discrimination will arise in the immigration process. It is the Panel's view that the Commission should have the power to initiate claims concerning what it views as discrimination in the immigration process, but not the basic distinction drawn in the immigration system between Canadian nationals and non-nationals. This limit is required by the basic idea that Canada should be able to determine who may come into the country. This would mean that the Commission could initiate claims about discriminatory practices carried on outside Canada by immigration or any other officials of the government of Canada. The same would be true about the activities of federally regulated employers and service providers carrying on business outside Canada. Canada's reputation for upholding human rights is at stake in the behaviour of its official and unofficial representatives abroad, especially in the actions of its officials and anyone else acting on behalf of the Canadian government.

We do not believe that the concept of who is sufficiently affected by a breach of the Act to be able to file a claim should be defined in the Act. The Panel is of the view that the ruling in *Re Singh* should also apply to other circumstances where someone has experienced the consequences of discrimination. In one case, a shareholder of a small corporation suffered such consequences from a discriminatory act by a government department against the corporation that he owned and operated. This is an unusual exception to the basic idea that human rights belong only to humans, not to corporations. We think that the concept of who is a person sufficiently affected by a breach of the Act for the purposes of filing a claim should be one that can adapt and develop with a growing understanding of the concept of equality.

Discrimination Based on Perception

The Panel is also of the view that, generally, treating an individual or group because they are perceived or appear to share the characteristics of a group protected by the Act, results in the same loss to that individual whether or not they actually have that characteristic. This appears to be true of all of the grounds in the Act. The Panel believes this principle should be stated in general terms for all of the grounds.

Further, in cases where the employer or service provider can show that there is a justification for the discrimination in a certain case, for example, where the employer can show that there is a *bona fide* occupational requirement for the job if the individual did not have that disability or characteristic, then the damaging effects of the discrimination were suffered because of a mistake on the part of the employer. In the few cases

where this occurs, the employer rather than the individual should be responsible for the mistake, and a finding of discrimination made.

Discrimination by Association

The Panel is of the view that there is a related issue to be dealt with here is, the situation where an individual is discriminated against because of his or her association with an individual who shares personal characteristics related to the grounds in the Act.

Someone who is refused employment because of the personal characteristics of their spouse is just as much a victim of discrimination as if he or she shared the personal characteristic of the spouse.

In the case of *Benner v. Canada* (1997), under the equality provisions of the Charter, the Supreme Court of Canada held that the *Citizenship Act* discriminated because it required him to undergo a security check because he was born outside Canada to a Canadian mother, while children born to a Canadian father outside Canada did not have this requirement. The Court held that the discrimination against the mother was unfairly visited on the child.

> "In fact, the guarantees of section 15 [the equality provision of the Charter] regarding race, skin colour, or ethnic background could otherwise be rendered nugatory by consistently making the parent of the actual target the focus of discrimination rather than the target himself or herself."

However, the Court said that it was not creating a general doctrine of discrimination by association and that it was leaving open the question of whether this analysis applied to other types of associations, for example those that are voluntary as opposed to involuntary, as in the case of mother and child. This issue should be left to the Tribunal to work out as suggested by the Court.

The Act would likely be interpreted in this way after the *Benner* decision. However, if this is not the case, then this principle should be added to the Act.

Recommendations:

147. We recommend that the Act cover all individuals present in Canada, including those who are not lawfully present.

148. We recommend that the Act not define the concept of who is a victim to allow it to grow with the understanding of the concept of equality.

149. We recommend that an individual not be able to obtain a stay of removal proceedings because a claim has been filed under the Act, nor should the Tribunal be able to grant immigration status. Further, claims filed about immigration matters should be dealt with according to our chapter on Multiple Proceedings.

150. We recommend that the Minister of Citizenship and Immigration continue to determine an individual's immigration status for the purposes of the *Canadian Human Rights Act*.

151. We recommend that the current restrictions on the right of individuals who are not Canadian citizens or permanent residents to file claims about events occurring outside Canada should remain.

152. We recommend that the Act continue to be broad enough to allow for the Tribunal's interpretation that allows an individual to file a complaint alleging discrimination in the refusal of a sponsorship application or with respect to a denial of a visitor's visa, even though the individual being sponsored or the visitor is not a citizen and the denial took place outside Canada.

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153. We recommend that the Commission should have the power to initiate claims concerning what it views as discrimination in the immigration process, including claims about discriminatory practices carried on outside Canada by immigration or other officials of the government of Canada based on information received from the public during the initial inquiries made to Commission officials and research carried out by the Commission. The Commission should also be able to initiate claims about the activities of federally regulated employers and service providers carrying on business outside Canada.

154. We recommend that the Act should provide that the duty to ensure equality without discrimination on any ground in the Act includes the perception that an individual or group of individuals has the personal characteristic relating to that ground. Where the discrimination is justified, but the individual did not have the characteristic at issue, then the finding of discrimination should stand.

155. We recommend that the Act prohibit discrimination against one person because of their association with another who is protected by the Act.

(b) Clarification of the Definition of Employment Under the Act

Issue

We considered the issue of whether the scope of coverage of the Act in employment matters was appropriate. This included a consideration of whether or not the Act had to be amended to provide protection to employees in Parliamentary institutions.

The Act

The 1977 Act prohibited discrimination in employment within federal jurisdiction, but it provided no specific definition of the term "employment."

Contract Employees

The question of the scope of the concept of employment comes up in a number of ways in human rights law. The first is whether a certain relationship can be described as employment when it might not come within the strict bounds of the legal test for employment. The second is whether an employer is liable for the actions of an employee who engages in discriminatory and therefore illegal conduct in the course of doing his or her job. This second issue is dealt with in chapter five on Internal Responsibility.

Prior to the June, 1998 amendments to the Act, tribunals and courts interpreted the concept of employment broadly to cover relationships that might not come under the technical legal definition of master and servant — the traditional term for the employer-employee relationship. This probably covers most contracts for services. Other cases have determined that independent contractors are covered by the general concept of employment.

In the case of *Rosin v. Canadian Forces* (1991), the Federal Court of Appeal applied a broad view of employment and held that an army cadet taking a three week course on parachuting was covered by the concept of employment because the Canadian Forces exercised a measure of control over him, required him to wear a uniform, paid him an honorarium and received some benefit from his attendance. The Court found that he was "utilized" by the Canadian Forces and an employee for the purposes of the Act. The Court stated that the purpose of the legislation required a broad interpretation.

In June, 1998 the Act was amended to include a definition of employment. It stated specifically in section 25 that "employment" included contractual relationships where an individual provided services personally to another individual. Thus, an independent contractor providing services to an employer within the federal jurisdiction would be covered by the employment provisions of the Act. This would apply to the situation of consultants.

The Panel is of the view that this definition is consistent with the broad policy purposes of the Act.

Parliamentary Employees

The purpose provision of the Act provides that the Act will apply "within the purview of matters coming within the legislative authority of Parliament..."

A broad interpretation of this provision might suggest that employees of Parliamentary institutions — which include the House of Commons, the Senate, the Library of Parliament and individuals who work for Ministers, Members of Parliament and Senators — are already covered under the Act.

However, the courts have held in a number of cases that in labour relations matters dealing with such employees, there must be specific provisions in law to override any special privileges of Parliament or its members which are held to exist in such employer-employee relationships. In fact, the *Official Languages Act* contains just such a provision. We are of the view that to remove any doubt, a similar provision should be added to the Act.

In the Panel's view, the universal principle of protection from discrimination in employment under the Act should not be reduced by any special privileges afforded to Parliament or its members. It would be unfortunate if the makers of this law were exempt from its operation.

Recommendation:

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(c) Successor Employers and Service Providers

Issue

We were asked to consider the rights and responsibilities of all parties when a business is sold or transferred before a human rights violation is resolved. For example, an employee or customer may have filed, or may have the basis for filing, a claim that the Act was breached at the time a business is transferred to a new owner or operator that continues to operate the business for the same purpose. From the claimant's point of view, this may mean that he or she may be unable to obtain a remedy, especially if the company that transferred the business is no longer in operation. The second and perhaps more important concern from the point of view of the advancement of workplace equality, is that the new employer or service provider may have bought a workplace or service that is still plagued by the very systemic discrimination concerns that triggered the first claim.

We also became concerned about what happens to a Tribunal decision that orders changes to ensure equality in a workplace when the workplace is disposed of to another entity.

The Act

There are no express successor employer or service provider provisions in human rights legislation today.

However, Boards of Inquiry, Tribunals and the Courts have dealt with this issue on a number of occasions. In one case under the Act, *Bouvier v. Metro Express* (1992), the complainant had made a sexual harassment complaint against her employer. By the time the case got before a Tribunal, Metro had sold to Loomis Courier Services Ltd. and the Commission sought to continue the complaint against the successor employer. The Tribunal and the Trial Division of the Federal Court dismissed the case against Loomis after deciding that it bore no responsibility for the actions of the vendor of the business. However, the Tribunal and Court did note that if the sale had been a sham to avoid the effect of the Act, then the result might have been different.

In another case, *Kearns v. P. Dickson Trucking Ltd.* (1989), the Tribunal held the successor employer liable when it appeared as though the sale of the business was a tactic to avoid liability under the Act. The Tribunals and courts therefore, appear to be unwilling to hold a successor employer liable for discrimination by the vendor, though it appears that they would hold a successor employer liable when the vendor was trying to avoid liability. Presumably this could be proven most easily when there was some sort of collusion between vendor and purchaser.

Basic Principles

The rule that would make a successor employer or service provider liable for the actions of the vendor only where the transaction was a sham does not take account of the remedial nature of human rights legislation. Further, and more importantly, it is not fully consistent with the purpose of the Act to ensure equality and to eliminate systemic discrimination in the workplace and in the provision of services. The successor employer or service provider also has an interest in the prevention of discrimination in the future in the workplace that it has purchased. In the case of *Robichaud v. Canada* (1987), the Supreme Court of Canada emphasized the important remedial function of the Act and the fact that only the employer who has control of the workplace and working conditions can provide that remedy.

The existence of a complaint or the grounds for a complaint in the vendor's workplace and a lack of resolution of the complaint with the vendor would suggest that the problem may continue in the newly transferred workplace. The Panel is of the view that it should not be necessary for an employee in the transferred workplace to file a new claim of discrimination where the original problem continues. This would mean either the solution to the problem would be delayed or ignored.

We believe it is important to see to the improvement of the workplace as soon as possible based on the original issue of discrimination. In the case of *Goyette v. Voyageur Colonial Ltd.* (1997), the Canadian Human Rights Tribunal held that Voyageur could not be held liable for actions occurring before the sale of the business to it, but that the Tribunal could continue to investigate the complaint of systemic sex discrimination because the claimants continued to work for the purchaser, Voyageur, after the purchase. The Panel also believes the transfer of a business should not deprive the individual claimant of any remedy for the non-compliance with the Act that has occurred.

The Labour Experience with Successor Employer Provisions

Successor provisions are quite common in labour statutes to preserve the bargaining rights of employees.

The *Canada Labour Code* provides that where an employer sells, leases, transfers or otherwise disposes of a business, and the trade unions continue in place, the collective agreements continue in force and the successor employer becomes a party to any proceedings, such as grievance arbitrations, and is bound to remedy any breaches of the collective agreement found pending when the business was sold. This means that grievance proceedings, that may include grievances about discrimination made under the anti-discrimination provisions of a collective agreement, can continue against the successor employer. A successor employer in situations of a sale, lease or merger of federal workplaces also has liabilities under Part III of the Code, that is in respect of such matters as unjust dismissal proceedings.

Similar concerns about the possibility of continuing systemic discrimination in the provision of services suggest that the successor service provider should also be liable in the same way as the successor employer. Inaccessible business premises that create barriers for people with disabilities may not have been taken care of by the predecessor service provider. Though the relationship between the claimant and the predecessor service provider may have been of shorter duration, this is typical of the difference between employment and service relationships. This does not undermine the need to be concerned about continuing systemic barriers. The successor service provider who is bound to ensure equality under the Act should have to remedy a problem that continues to exist.

The Period for Filing Human Rights Claims

Employers and service providers have expressed concerns that making them liable for human rights claims means they would be unsure of their liabilities when buying a business.

One way of addressing this concern would be to make the successor employer or service provider responsible only for claims that are filed with the Commission as of the date of the sale, or perhaps even a period of time before the sale. However, this would potentially cut off valid claims from being filed as employees or consumers of services may not be aware that the business was being sold. The Panel believes employees or consumers of services should be able to file a claim within a specified period of time after the transfer of the business. This period should be long enough to ensure that they will learn of the transfer. Three to six months should be long enough for this purpose.

In any event, a purchasing employer will likely have a good idea of the state of the workplace before purchasing. Employers who have to carry out workplace reviews for barriers to the employment of the four employment equity groups under the *Employment Equity Act* will have that information available. Grievances filed under anti-discrimination provisions of collective agreements will also be an indicator of the health of the workplace. In addition, a purchaser of a business can include provisions in the transfer agreement to allow it to seek reimbursement from the seller in the event of a human rights claim. A claimant, on the other hand, does not have that power. Other complaints filed with the Commission earlier may indicate patterns of workplace discrimination issues. Another source of information would be the Tribunal. The Tribunal should be able to advise a prospective purchaser of claims currently filed with it against the prospective vendor.

Creating successor employer or service provider liability will have the effect of making a purchaser examine what it is purchasing more carefully from a human rights perspective. This will act as a general incentive to all employers and service providers to keep aware of and deal with workplace discrimination issues, especially those of a systemic nature. In fact, a company wishing to sell its undertaking might well have to carry out its own audit of human rights practices to be able to assure a purchaser that it was unlikely to receive a complaint.

The predecessor employer or service provider should also remain liable for the remedy and any remedy could be apportioned based on their responsibility. A viable former employer might be found to be responsible for providing compensation, while the part of the order to improve the workplace may be made against the successor employer or service provider who now has control of it.

Liability for Extra Damages

The Panel is of the view that it would not be fair to make a successor employer or service provider liable for "special compensation" for engaging in the discriminatory practice willfully or recklessly under the Act as long as it can show it acted in good faith in the circumstances surrounding the sale and afterwards.

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A Tribunal Order Should Follow the Workplace

We were concerned about the situation where an order is made by the Tribunal to bring the workplace into compliance with the Act and the employer or service provider later sells the workplace to another person. If there is continuity of the work and activities by the employees and the purpose of the business remains the same, we think the order of the Tribunal should continue to apply even though it was not made against the purchaser. The old problem should not be allowed to repeat itself. We think the order of the Tribunal should follow the workplace.

Recommendations:

157. We recommend that the Act provide that where an employer or service provider sells, transfers, leases or otherwise disposes of control over its business, then the person who obtains control over the business becomes a party to a claim filed against the employer or service provider at the time of the transfer or within a specified time thereafter and may be liable along with the original employer or service provider to a Tribunal order. We recommend that the specified time be long enough to ensure that employees and consumers of the service know that the sale has taken place. This should be between three and six months.

158. We recommend that the Act make clear that the original employer or service provider also remains liable.

159. We recommend that a successor employer or service provider should not be liable for "special compensation" for engaging in the discriminatory practice willfully or recklessly under the Act, as long as it can show that it acted in good faith in the circumstances surrounding the sale and afterwards.

160. We recommend that the Act provide that where an order is made by the Tribunal to take steps over time to bring a workplace into compliance with the Act and the employer or service provider later sells the workplace to another person, and where there is continuity of the work and activities by the employees and the purpose of the business remains the same, the order of the Tribunal should continue to apply even though it was not made against the new employer or service provider.

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(d) Harassment

Issue

The Act prohibits harassment on any of the grounds listed in the Act. The Panel was asked to determine whether the current provisions are sufficient and whether a definition of the actions that constitute harassment would help clarify the Act.

The Act

There is no definition of harassment in the current Act. The Act precludes harassment on any ground by prohibiting it as a form of discrimination, making it a discriminatory practice to harass an individual specifically in the context of services, facilities or employment. For further clarification, the Act states that sexual harassment is harassment on a prohibited ground. There are two provisions because at one time there were conflicting court decisions about whether sexual harassment was "sex" discrimination. Subsection 14(2) was passed to clarify this principle in the federal law. Finally, the Supreme Court of Canada in *Janzen v. Platy Enterprises* in 1989 held that sexual harassment was indeed a form of sex discrimination.

Additionally, the *Canada Labour Code* assures all employees covered by it that they are entitled to employment free of sexual harassment. The Code requires each employer to make reasonable efforts to ensure that no employee is subjected to sexual harassment and, after consulting employees or their representatives, to issue a policy statement concerning sexual harassment. The Code defines sexual harassment.

Consultations and Submissions

During the consultations, some individuals and organizations indicated that harassment should be defined either in the Act or in guidelines issued by the Commission. Some wanted guidelines or best practices codes defining a model anti-harassment mechanism. A number of employers suggested that once the mechanism was in place, no complaint could be filed unless the mechanism failed to work. Others wanted the Act to require that the mechanism be subject to audit to ensure that it was working.

Some groups expressed concern about a single legislated definition. A number emphasized the need to be able to go to the Tribunal for an interim order to protect the victim and prevent serious problems from developing in the workplace.

On the question of definition, we heard conflicting views. For example:

"A body of caselaw has been developed which provides a good definition of what actions are considered to be harassment. To attempt to codify a definition at this point in time may simply 'muddy the waters' since the logical inference to be drawn is that the codification was necessary to effect a change to the legal meaning of harassment developed by the courts and tribunal. It would also close the categories of what constitutes harassment." (Canadian Bankers Association)

"To define harassment under the Act may have a restrictive rather than salutory effect. For example, the Ontario Code uses a definition of harassment with requires that there be demonstrated "*a course of vexatious comment or conduct...*" While frequently there is a course of conduct involved in harassment cases, there are also occasions where the incident of harassment is singular, but is nevertheless very detrimental to the complainant. These kinds of situations cannot be addressed if the term is so strictly defined." (Canadian Labour Congress)

As an example of an opposing view, we heard:
"The Institute would support the inclusion of a definition. This would have an important educational impact, as well as, it would ensure that employers and service providers have a clear idea of what harassment is. Harassment should be defined as any behaviour, private or public, which denies individuals their dignity and respect and which is offensive, embarrassing or humiliating. Abuse of authority should be defined as harassing behaviour." (Professional Institute of the Public Service of Canada)

The Panel's Views

(i) Definition

In our view the Act should not be amended to define harassment. The tribunals and courts have developed quite a clear meaning of harassment and it can be expected to continue to evolve as our understanding of the requirements of equality increases. During our

consultations, we did not hear of any misinterpretations of the concept that risked narrowing the protection it provides. There does not appear to be a need to define sexual harassment or harassment on other grounds, especially as this might restrict further development of the law.

Other action can be taken to clarify what harassment currently means. The Commission already has publications on this issue. The Commission should use its power to issue policies and guidelines to educate employers and employees about the issue. In the Panel's view, the practice of educating the public is something that should be expanded because of the concerns expressed by participants at the consultations about the need for more information on harassment.

We do not believe that the prohibition of harassment in the Act should be extended to what might be described as personal harassment, that is, harassment unrelated to the grounds of discrimination covered by the Act. This is certainly an important employment matter. However, personal harassment is not the same as harassment on the ground of sex or race, and could divert the focus of the Act away from historic patterns of discrimination experienced by members of disadvantaged groups.

It is very important to understand the connection between harassment and systemic discrimination. Some claims alleging sexual harassment might not meet the definition of systemic discrimination that has developed in the cases, yet may still be connected in the claimant's workplace to the historical underlying patterns of discrimination suffered by the disadvantaged group with which the claimant is associated. In considering the claim only as a case of harassment, the underlying systemic discrimination might be missed. We think this is something that should be kept in mind in dealing with harassment cases.

(ii) Power to Issue Interim Orders

The claims process we are recommending in chapter ten will empower the Tribunal to make interim orders (orders made until the claim is finally resolved). For example, where the employer does not take action to ensure the claimant in a sexual harassment claim is able to continue in her job, the Tribunal could order adjustments to reporting relationships while the matter is pending in the Tribunal process. This interim power should be able to deal with serious cases of harassment on the grounds in the Act.

(iii) Internal Responsibility Model

The internal responsibility process we are recommending should be able to deal with harassment issues. In fact, most cases where such systems currently operate within workplaces appear to focus on harassment situations. It can be expected that internal human rights committees may have the capacity to deal with harassment issues both as policy and dispute resolution matters.

(iv) Retaliation

Anti-retaliation provisions are important in harassment cases. Harassment can cause divisions in the workplace and recriminations. Victims and those who participate in the case should be protected from retaliation and know that they are protected.

We are recommending that the retaliation provisions of the Act be strengthened and that they should be extended to protect individuals participating in the internal responsibility systems of employers and inquiries that the Commission conducts. We discuss retaliation later in this chapter.

(v) Overlap with Labour Law

As noted earlier, both the Act and the *Canada Labour Code* prohibit sexual harassment. The Code provides a definition of sexual harassment and states that every employee is entitled to employment free of it. It also requires employers to take every reasonable effort to prevent it and, after consulting with employees and their representatives, to develop an anti-sexual harassment policy that includes a statement that the employer will discipline harassers, a statement about the way to bring complaints of sexual harassment and that they will be handled in a confidential way, and a statement that recourse to the *Canadian Human Rights Act* is open to them. The employer must make all within its direction aware of the policy.

While it may be possible to coordinate education and training initiatives on sexual harassment, the prohibition in the *Canadian Human Rights Act* is broader than that in the Code in two ways. First, it extends to all of the listed grounds of discrimination, not just sexual harassment. Second, it has been found among workplace conditions that have led to a finding of systemic discrimination against protected groups that have experienced historical patterns of disadvantage in our society.

We believe that the prohibitions in both statutes can play a useful role.

(e) Retaliation

Issue

We have been asked to decide whether the Act currently provides adequate protection against retaliation by the person against whom the complaint was filed.

The Act

The current Act uses two methods of prohibiting retaliation in relation to human rights complaints.

The Act makes it a criminal offence in section 59 to "threaten, intimidate or discriminate against" someone who has filed, assisted in the filing or processing of a complaint or who proposes to do so. The Act provides in section 60 that the Attorney General of Canada must consent to a prosecution of a charge under this provision. On summary conviction, the judge of the criminal court with jurisdiction over the offence can order a fine of up to $50,000. There have been some convictions under this section.

The Act was amended in June 1998 to add a non-criminal prohibition of retaliation in section 14.1, which makes it a discriminatory practice for an alleged discriminator to retaliate or threaten retaliation against a complainant for filing the complaint. This can lead to investigation, conciliation and a Tribunal hearing as in other complaints. This provision is narrower than a criminal offence provision because it protects only the complainant or the victim, if someone filed a complaint on behalf of a victim. This approach permits interim measures to be ordered against retaliation, such as a cease and desist order, reinstatement, compensation and expenses.

Discussion

The criminal offence of retaliation creates some problems. First, it is difficult for the police who are called in to investigate whether an action by an employer, for example, is retaliation or whether it is simply discipline. The police must find evidence to meet the criminal onus of proof. That is, the evidence must show that the act was retaliation beyond a reasonable doubt. Proof beyond a reasonable doubt is not the usual test in resolving workplace disputes. Usually, arbitrators and tribunals ask whether it is more likely than not that the grievor has shown that rights have been breached. It is hard to show beyond a reasonable doubt that an employer's action taken against an employee was retaliation, rather than disciplinary.

Further, human rights legislation is meant to be remedial, not punitive. Though in their early stages, human rights laws could be enforced through the criminal courts, these statutes no longer use criminal enforcement as a tool. Most provincial human rights laws prohibit retaliation, but do not use the criminal process.

In the Panel's view, the criminal offence should be retained, but used only for very serious cases of retaliation. It is important that participants in the human rights process know that they are protected in the exercise of their rights. The deterrent effect of the provision is still important because it underlines society's conviction that there should be no interference with those who wish to use the system.

The Panel believes the civil prohibition of retaliation should be as broad as the criminal one and the new provisions added in June, 1998, should be expanded to offer the same scope of protection for all participants in the process: the claimant, witnesses, or any other person involved. This is to show consistency between the civil and criminal prohibitions of retaliation.

We believe the provisions as they stand would cover retaliation during and after a Tribunal process.

The Panel is also of the view that individuals participating in the inquiry process and in the internal responsibility process, both discussed in Part II of our Report, should also be protected from retaliation.

We are also concerned that there may be situations where an employee might be the subject of retaliation by an employer if he or she has refused to carry out a direction that would result in a breach of the Act. There have been cases where an individual who was told not to serve members of a group identified by a ground of discrimination was disciplined when the order was disobeyed. This would probably result in a finding that the Act was breached on the ground of discrimination involved because the employer's action was based on that ground despite the fact that the employee was not a member of that group. However, we wish to make certain that this kind of retaliation is prohibited.

Recommendations:

161. We recommend that the criminal offence of retaliation remain in the Act to demonstrate the conviction of society that this kind of interference in the claims process cannot be tolerated.

162. We recommend that the civil prohibition of retaliation be as broad as the criminal prohibition.

163. We recommend that individuals who participate in the inquiries conducted by the Commission and who participate in the internal responsibility system, or who otherwise engage in activities promoting compliance with the Act, should also be protected from retaliation.

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CHAPTER 20
General Points

A Five-Year Review

The recommendations we have made are intended to provide a new vision for the advancement of equality in the federal sphere. We have recommended some new structures that we think will advance this cause. We believe that it would be a good idea for the Minister of Justice to carry out a review of the new Act after it has had a chance to operate for five years. We have noted throughout our Report various matters that might deserve special attention in the five-year review.

The *Employment Equity Act* contains provision for a five-year review and has undergone substantial changes. That process will be commencing soon.

A Federal Ombudsman

The Commission advises us that it receives about 50,000 calls per year at its Headquarters and regional offices. The Commission's 1999 Annual Report states that most of these calls are about matters beyond the Commission's jurisdiction.

We are concerned that some of this demand is created because there is no office of government that looks after general concerns with the way people have been treated for reasons other than those related to this Act. It may be appropriate for the Minister to consider setting up an office to handle general complaints about unfairness in the way people have been treated by government. In our view, this would remove some of the pressure from the new system that we are recommending and make more efficient use of the officials at the Commission who will continue to answer inquiries from the public.

A Plea for Resources

One of the things we heard often during our consultations was the concern that the Commission have enough resources to carry out its important tasks. In its 1999 Annual Report, the Commission states that it focused its attention primarily on its protection role and undertook a series of projects to improve its complaints process, and, as a result, "had to reallocate its already limited resources, and reduce its efforts in other program areas."

Our recommendations will have the effect of allowing the Commission to focus its resources on priorities closely attuned to the purposes of the Act and achieving the greatest equality impact for its resource commitment. At the same time, it will have to make increased use of all of the tools we have described for achieving equality.

The French and English Versions of the New Act

We are concerned that the French and English versions of the Act do not always accord. An example is the use of "hate messages" in the marginal notes to section 13 in the English text and "propagande haineuse" in the French. The latter term suggests a higher level of proof of its invidious quality than the term "hate messages." We urge the Minister to ensure that both versions of the Act are reconciled in the future.

Recommendations:

164. We recommend that the government should provide the resources that the Commission and Tribunal need to make the most of the recommendations that we have made.

165. We recommend that the Act be reviewed in five years after the changes that we have recommended have been implemented to ensure that it is working effectively.

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ANNEX A
Terms of Reference: Canadian Human Rights Act Review

The *Canadian Human Rights Act*, which received Royal Assent on July 14, 1977, is an important aspect of our national human rights protection. Through human rights legislation, we set out many of the fundamental values of our society. The Act itself prohibits discrimination in employment, services, contracts and accommodation.

Whereas the *Canadian Charter of Rights and Freedoms* protects individuals primarily against acts committed by governments, human rights legislation protects against discriminatory acts committed by the federal government, businesses and individuals in areas of federal jurisdiction. The Act applies to such areas as telecommunications, banking and interprovincial transportation and was designed to provide an informal, expeditious and inexpensive mechanism for the resolution of human rights complaints.

From the time of the 1985 all-party Parliamentary Standing Committee report, "*Equality for All*", and the government's 1986 response, "*Towards Equality*", it has been clear that there is a need to review human rights protection in Canada. Recently, the Auditor General and others recommended that improvements be made to make the human rights system more effective in resolving allegations of discrimination.

Over the years, there have been many significant developments in the evolution of human rights law. Governments have responded by amending the Act when required. The Act was amended in 1983 to expressly state that pregnancy or childbirth is included in the ground of "sex." In 1996, sexual orientation was added as a prohibited ground of discrimination. More recently, the Minister of Justice amended the Act to increase protection for persons with disabilities by requiring employers and service providers to accommodate all victims of discrimination.

The review of the *Canadian Human Rights Act* is a logical step in the government's efforts to improve confidence in the federal human rights system. The review will examine and report to the Minister of Justice within one year.

The review will include, but is not restricted to:

- an examination of the purpose and grounds, including social condition, to ensure that the Act accords with modern human rights and equality principles;
- a determination of the adequacy of the scope and jurisdiction of the Act, including an examination of its exemptions;
- a review of the complaints-based model and recommendations for enhancing or changing the model to improve protection from both individual and systemic discrimination, while ensuring that the process is efficient and effective; and
- an examination of the powers and procedures of the Canadian Human Rights Commission and the Human Rights Tribunal.

In light of several significant pay equity cases currently before the courts or tribunals and the importance of the issue itself, the pay equity provisions of the Act (section 11) will not be included in this review but will be undertaken through a separate review.

Mandate of the Canadian Human Rights Act Review Panel

The Review Panel is composed of four members:

- The Honourable Gérard La Forest, Fredericton, New Brunswick (Chair);
- Madame Renée Dupuis, Québec, Québec;
- Professor William W. Black, Vancouver, British Columbia; and
- Professor Harish C. Jain, Hamilton, Ontario.

The Panel Members have been appointed from April 8, 1999 to April 8, 2000. The panel members report to and are accountable to the Minister of Justice.

The Review Panel will be supported by a Secretariat. The Secretariat will work under the direction of the Chair of the Review Panel in an administrative capacity.

The Review Panel will hold consultations with the public, the Canadian Human Rights Commission, employers, unions, equality-seeking groups, non-governmental organizations, government departments, commissions, crown corporations, agencies and other interested members of the public.

The Review Panel will submit a report to the Minister of Justice with recommendations for improving the *Canadian Human Rights Act* by April 8, 2000.

Note: Our mandate was extended until mid-June, 2000 to permit additional time for translation, editing and printing of the final report.

ANNEX B
Glossary of Terms

Adverse Effect Discrimination
Discrimination that arises where an apparently neutral rule creates a disadvantage for individuals based on a personal characteristic.

Affirmative Action
Positive measures to overcome disadvantage experienced by certain groups.

Alternative Dispute Resolution (ADR)
Processes used in place of or as a supplement to litigation (such as mediation, negotiation, arbitration and conciliation) in order to facilitate discussion and settle disputes.

Amendments/Addition of Parties
Refers to any changes authorized to be made after a claim is filed to change the claim or the parties.

***Bona Fide* Occupational Requirement/*Bona Fide* Justification**
Acceptable reasons given for discriminatory practices. Job requirements or restrictions in services honestly and demonstrably imposed for reasons of efficiency, safety or economy.

***Canadian Charter of Rights and Freedoms*; Charter questions**
That part of the Canadian Constitution guaranteeing individuals fundamental rights and freedoms, including equality under the law.

Case Management Officer
In the direct access model, the officer assigned to each claim responsible for tracking the claim through its initial stages to its resolution.

Claim
All actions filed with the Tribunal under the new direct access claim model.

Claimant
An individual, or group of individuals, an organization, or the Commission that file a claim under the new direct access system before the Tribunal.

Code of Practice
Standards developed by consultation to deal with certain matters.

Complaint System
Mechanism within the current *Canadian Human Rights Act* allowing persons to file a complaint of discrimination with the Commission; process by which such complaints are investigated, settled or heard by the Tribunal.

Deference
In the context of **judicial review**, deference is the restraint shown by the courts from interference with the decision of a public officer or tribunal.

Direct Discrimination
In service provision or employment, practices or attitudes that expressly discriminate against members of disadvantaged groups.

Disclosure
The process prior to tribunal or court proceedings during which the facts and substantiating materials of all relevant parties are shared.

Discretion
In the context of decision-making by public authorities, discretion means a broad power given to them by **statute** to make decisions exercising their own judgment.

Examination for Discovery
A pre-hearing procedure allowing the parties to a claim to question one another under oath.

Governor in Council
The appointed representative of the Executive branch of federal government, or Cabinet.

(Prohibited) Grounds of Discrimination
Those characteristics under the Act such as race and age, for which discrimination is forbidden.

Injunction
An order given by a decision-making body which forbids a party to do or continue to do a harmful act.

Inquiry
An investigation by a public body into a matter within its **jurisdiction**, possibly involving witness testimony or the submission of relevant documents.

Interim Orders
Orders made 'in the meantime', until a final decision is made.

Internal Responsibility Model
An internal mechanism in the workplace designed to address human rights issues involving a complaint process and/or preventative measures.

Interventions/Intervenor
Person or persons who claim to have an interest in a particular case may be allowed to intervene and present their arguments in the matter at the discretion of the court/tribunal.

Issue Estoppel
Legal rule meant to prevent a tribunal from re-deciding the same issue placed before it by the same parties where an earlier decision was final. See also ***res judicata***.

Judicial Review
Consideration of the correctness or reasonableness of a public authority or tribunal decision by a higher court (judge).

Jurisdiction
Refers to the statutory authority given to a public body to deal with a matter.

Limitation Period
A time limit. One might be limited to filing a complaint within a particular period of time after an incident.

Natural Justice
The legal rules that ensure fairness before administrative tribunals.

Notice (in procedural matters)
The formal process by which all relevant parties are notified about proceedings under the Act.

Preamble
A short statement of principles at the beginning of an Act.

Pre-hearing process
In the direct access model, the preliminary review of a claim conducted by one or more Tribunal Members for the purpose of determining whether a matter should go to a full hearing before the Tribunal, or whether it should be dealt with by way of a **speedy hearing**.

Primacy
A law that has primacy has priority over other laws where there is a conflict.

Prima Facie
'At first glance'. In legal terms, it often refers to the initial factual indications that a claimant might offer that harm has been done by a respondent.

Privative Clause
A provision in a **statute** that aims to restrict a court's power to review a tribunal decision.

Privilege
Legal rules of privilege exempt documents from disclosure. For example, solicitor-client privilege ensures that most communications between lawyer and client can remain between them in the event of litigation.

Public Interest
Refers to those interests that the community at large may have in a particular case; in human rights cases, the public interest lies in the advancement of equality and the prevention of discrimination.

Quasi-constitutional status
Courts have said that the *Canadian Human Rights Act* has this status, meaning that the Act is almost as fundamental to our legal structure as the Constitution, even though it is a law passed by Parliament like any other.

Regulations
Rules or guidelines issued by the **Governor in Council/ Lieutenant Governor in Council** that give effect to statutory provisions.

Regulatory Compliance
Where a **statute** and its **regulations** specify that certain standards must be met in a given industry or sector, regulatory compliance refers to the process that ensures that those standards are met.

Remedy
In the context of tribunal decisions, the tribunal's decision to compensate a claimant and prevent future breaches.

Reply
The response to a claim filed under the new direct access claim model.

Respondent
The party that responds to a claim filed under the new direct access claim model.

Res Judicata
The legal rule that a claim that has been heard and settled before a court or tribunal cannot be heard again. See also **issue estoppel**.

Retroactive
A decision or law that applies retroactively creates new obligations or takes away existing rights in respect of incidents already past.

Speedy Hearing
In the direct access model, a quick hearing and decision in a matter can take place early in the process on issues like **jurisdiction**, or after **disclosure** reveals no real claim or defence.

Status Hearing
In the direct access model, a mandatory status review of every claim still in the system and not heard by the Tribunal after a certain period of time.

Statute
An Act of Parliament such as the *Canadian Human Rights Act* or the *Criminal Code*.

Successor Employers/Successor Service Providers
In the event that a business or part of a business is sold, the employer or service provider that takes control of it.

Systemic Discrimination
Refers to barriers in employment and service provision that result from intentional or unintentional discriminatory practices, attitudes and values.

ANNEX C
Summary of Recommendations

Chapter 3 The Purpose and Language of the *Canadian Human Rights Act*

1. We recommend that the Act have a preamble referring to the various international agreements that Canada has entered into that refer to equality and discrimination.
2. We recommend that the Act contain a purpose clause in conformity with the principle of the advancement of equality of all in Canada and the elimination of all forms of discrimination, including systemic discrimination, taking into account patterns of disadvantage in our society.
3. We recommend that the language of the Act be premised on a duty of employers and service providers to ensure equality without discrimination in the workplace and in the provision of services. We recommend that the duty to ensure equality include a duty to provide accommodation to the point of undue hardship.

(a) Systemic Discrimination

4. We recommend that the *Employment Equity Act* and the Act should be made to work together so that it is possible to obtain an employment equity order like the one that was approved by the Supreme Court of Canada in *Action Travail des Femmes*, based on a close examination of an employer's work force and workplace. We recommend that if the consequential amendments made to the Act by the *Employment Equity Act* stand in the way of this, they should be changed.
5. We recommend that a process be established to ensure that community groups have a way of giving input into the Commission's implementation of its responsibilities under the EEA.
6. We recommend that the Commission and its auditors press for the broadest interpretation of their powers and that any decision-maker resolve any doubt about the scope of these powers in favour of the Commission.
7. We recommend that the relationship between the Act and the *Employment Equity Act* be considered in the five year review that we are recommending for the Act.
8. We recommend that the Act provide that nothing in the *Employment Equity Act* be interpreted to limit the powers of the Commission or the Tribunal under the Act.

(b) Primacy

9. We recommend that where an employer or service provider is required by statute or regulation to apply a *prima facie* discriminatory rule, policy or standard, that the Act provide that the government be required to appear as a party to the matter to defend the statute or regulation.

Chapter 5 Internal Responsibility Model

10. We recommend that the Act make employers and service providers liable for the acts of their employees to the extent that the employer controls the workplace that they work in, whether in or outside of the normal workplace.
11. We recommend that the Act require all employers with more than five employees to establish an internal responsibility system to deal with human rights matters within their control. The situation of employers with between 5 and 20 employees should be recognized as it is in the occupational health and safety system.
12. We recommend that the requirement to have an internal responsibility system and the elements of this system be established in the Act with the following minimum elements:
    (a) management-labour cooperation;
    (b) policies and programs promoting equality development;
    (c) training provided to all managers and employees;
    (d) mechanism for the internal resolution of complaints of discrimination, including effective remedies for discrimination, and a right to refuse work in very serious cases;
    (e) senior level commitment;
    (f) monitoring and documenting equality issues in the workplace;
    (g) maintaining liaison with the Commission and other sources of information about human rights in the workplace;

(h) monitoring the effectiveness of equality programs and procedures; and
(i) compensation and protection of employees engaged in the work of the system.

13. We recommend that the Act provide that where the employer can show that it has an effective internal responsibility system in place for the resolution of complaints, the Tribunal may dismiss a claim unless the claimant proves that this system failed to deal fully with the human rights issues raised by the case or failed to provide an adequate remedy.
14. We recommend that the internal responsibility system also deal with equality issues in the provision of services by that employer to the general public.
15. We recommend that this internal responsibility system be reviewed when the Act is reviewed after five years of operation to determine whether adjustments should be made.

Chapter 6 Regulatory Compliance Scheme

16. We recommend that the Regulation power under the Act should be maintained and that regulations governing accessibility are necessary.
17. We recommend that regulations be made to create standards for equality in areas where the value of standards and the kinds of standards required are clear.
18. We recommend that the Commission be given power to make these regulations, subject to such controls as Parliament places on the power, such as notice and consultation. If the Commission is not given such a power, then we recommend that the Minister of Justice, as the Minister of the Crown responsible for the Act, propose such regulations for passage by the Governor in Council. We recommend that the regulations be enforced through an audit system, perhaps tied to a government audit program to maximize the use of government resources.
19. We recommend that the Commission be given specific power to engage in making Codes of Practice and Policy Statements to clarify compliance with the Act and to educate the general public about the issues and their solutions.
20. We recommend that these various powers be used more extensively than the comparable existing powers have been used.

Chapter 7 An Inquiry Power

21. We recommend that the research and information-gathering powers in the Act be modified to allow the Commission to undertake inquiries on specific issues relating to its duties and the purpose of the Act. The outcome of such an inquiry would not be a mandatory order, but rather recommendations for solving an on-going problem. The inquiry would also not determine civil or criminal liability.
22. We recommend that the Commission be given sufficient powers of enquiry to ensure that it can obtain the necessary information. We recommend that regulations dealing with matters such as confidentiality be developed to protect the interests of the participants in the process.

Chapter 8 Education and Promotion of Equality

(a) A National Approach

23. We recommend that the Act emphasize the importance of the Commission's education and promotion function and that the Commission take a more active role in this area.
24. We recommend that the Commission be given sufficient resources to undertake effective human rights education and promotion initiatives.
25. We recommend that the Commission work towards greater coordination of educational activities between itself and federal government departments, provincial human rights agencies, and organizations interested in human rights issues.

(b) The Commission's International Activities

26. We recommend that the Commission should be authorized by the Act to enter into agreements to carry out support work with human rights institutions outside Canada in keeping with its status as a national human rights Commission.
27. We recommend that the funding of such agreements and the resources (budget and staff) be provided by the Canadian agency or department that wishes the Commission to carry out these projects rather than from the Commission's own resources.

Chapter 9 Reform of the Complaint Process

28. We recommend that the Act provide a process that allows claimants the right to bring their cases directly to the Tribunal themselves with public legal assistance.

29. We recommend that the Commission be empowered to join in the cases that are the most significant human rights cases that will provide the greatest equality impact.

Chapter 10 The New Direct Access Claim Model

(b) Initial Inquiries from the Public

30. We recommend that the Commission continue to deal with questions from the public and continue to assist potential claimants to draft their claims and assemble the materials necessary to support their cases.
31. We recommend that the Commission take a proactive approach in its role to ensure the accessibility of the claims process to individuals and groups who might otherwise be less informed about their right to equality in employment and services.

(c) Filing a Claim with the Tribunal

32. We recommend that claims be filed directly with the Tribunal.
33. We recommend that copies of all claims be sent to the Commission as soon as they are received to keep the Commission informed and to keep track of patterns of discrimination.

(d) The Tribunal Process

34. We recommend that the Tribunal have power to make Rules of Procedure that have the force of law.
35. We recommend the Act require that a claimant have some reasonable and objective basis for an alleged human rights claim.
36. We recommend that the Tribunal be given power to design an appropriate claim form in its Rules of Procedure.
37. We recommend that the Act or the Rules of Procedure provide that the claim form and supporting material consist of the allegations of discrimination and a description of the facts. We also recommend that the disclosure process begin without delay and that the documents concerning the claim in the possession of the claimant be filed at the same time as the claim. The claimant should prepare a questionnaire that sets out the initial questions that the claimant has of the person alleged to have breached their rights. The Tribunal's Rules should deal with other disclosure issues to ensure that the process proceeds quickly and fairly.
38. We recommend that the Act or the Rules of Procedures provide that the person responding to the claim must promptly file a reply, answers to the questionnaire and related documents within a specified time, such as 30 days.
39. We recommend that the Act or Rules of Procedure provide that if a claimant fails to meet the time limit the claim could be dismissed. If the person responding to the claim fails to meet the time limit, their defence could be struck out and the allegations of discrimination be deemed to be admitted. The Tribunal should be able to extend the time limit where there is strong justification.
40. We also recommend that the Act provide that a claim cannot be dismissed on technical objections, unless the defect breaches the rules of natural justice.
41. We recommend that the Commission continue to provide assistance to claimants by assisting them with drafting their claims and putting together the necessary supporting materials. We recommend that legal assistance be available if necessary at this stage in preparing complex claims for filing with the Tribunal.
42. We recommend that the Commission and the Tribunal continue to provide materials to the public concerning how the claims process works and what is expected of claimants and respondents.
43. We recommend that the Commission pursue methods of involving community groups and labour organizations in assisting claimants in the claims process.

(e) Case Management

44. We recommend that each claim be assigned to a case management officer who would be responsible for piloting the claim through the process.
45. We recommend that the Rules of Procedure provide for immediate service of the claim and its supporting material on the person or persons who must respond to a claim.

(f) The Pre-Hearing Process

46. We recommend that the Act provide for a pre-hearing process presided over by members of the Tribunal to review each claim that is received by

the Tribunal to determine what kind of hearing is needed to make a decision on the merits of the claim.

47. We recommend that the Act provide that where the Tribunal member or members decide that the matter should proceed to a speedy hearing on an issue or issues, either by themselves or after receiving notice of a matter that should be dealt with in the pre-hearing process from the person responding to the claim, the Tribunal member should notify the claimant and other parties of the speedy hearing and the way that it will be conducted. We recommend that the Act provide the Tribunal member with sufficient discretion on how the pre-hearing should be held, consistent with the rules of natural justice, to enable the process to proceed fairly and efficiently. The Tribunal member should be able to ask for written or oral submissions to determine the issue.
48. We recommend that the Rules of Procedure provide a short, specified time period for carrying out the pre-hearing process.
49. We recommend that the general limitation period for claims remain as it is in the current Act, that is, one year from the discriminatory act or from the last act of discrimination if there was a continuing series of related discriminatory acts.
50. We recommend that the Tribunal be able to extend the time period in two specific cases where the claimant was incapable of filing a claim because of a disability or other serious reason; or where the claimant could not have reasonably known that he or she suffered because of a breach of the Act until after the year period was up. The Tribunal should have the power to extend the time for a reasonable period to enable claimants to file their claims.
51. We recommend that the Act empower the Tribunal to dismiss all or part of a claim or reply after a speedy hearing, where the claim or reply is without merit or legal foundation and where there is no reasonable likelihood that further proceedings would establish that the claim or defence has merit or legal foundation.
52. We recommend that the Tribunal be able to dismiss a claim or defence made in bad faith.
53. We recommend that the Tribunal be able to dismiss a claim that it has already decided.
54. We recommend that the Tribunal provide short reasons for claims or replies they have dismissed in whole or in part by way of speedy hearing within the pre-hearing process. There should be no special review mechanism for these decisions.

(g) The Commission's Role in a Claim

55. We recommend that the Act empower the Commission to initiate claims itself as it may do currently and also be empowered to join claims brought by other individuals and organizations as a full party to the claim. The Commission should be able to join simply by filing the appropriate Notice with the Tribunal and advising the parties within a specified time. The Commission's function in such cases would be to prepare the claim for alternate dispute resolution (ADR) and hearing in the Tribunal process.
56. We recommend that the Act specify some of the criteria for claims that the Commission will initiate and join as a party and allow the Commission to develop others in consultation with interested individuals and organizations.
57. We recommend that these criteria be based on the principle of achieving the greatest advancement of equality. The criteria could include:
    - whether the case raises a serious issue of systemic discrimination (as might be found in a major policy of an employer or service provider);
    - whether the claim raises a new point of law or might settle one that remains in doubt;
    - whether the complexity and importance of the claim requires the specialized support of the Commission;
    - whether the claim would provide a benefit for many other individuals in the same position as the claimant;
    - whether the duty to ensure equality in employment and services was breached by activity authorized by statute or regulation;
    - whether there is a glaring unfairness in the case that should be pursued simply to ensure that justice is done;
    - whether the case is one of public interest sufficient to justify the Commission joining.
58. We recommend that the criteria be applied by a member of the Commission who would be available on a full-time basis or by an experienced

official with sufficient training to carry out this function.

59. We recommend that where it is not clear from the claim and supporting material that this is a claim that meets the criteria for joining as a party, that the Act or Rules of Procedure should enable the Commission to notify the Tribunal and parties that it needs a short time, specified in the Act or the Rules, to make inquiries and decide whether or not to join in the claim. The claim would wait for the Commission to make this decision and ADR would commence once it was made. The Commission should make every effort to make this decision as quickly as possible.
60. We recommend that even if the Commission decides not to join as a party in the short time specified, it retain the right to join later, based on new information, on application to the Tribunal. Similarly, we recommend that the Commission be entitled to withdraw from a case based on new information.

(h) Alternate Dispute Resolution (ADR) Mechanism

61. We recommend that alternate dispute resolution be offered early in the Tribunal process.

(i) Tribunal Disclosure Powers

62. We recommend that the Tribunal Rules ensure that the parties to the Tribunal hearing are fully informed about the relevant facts. The Act or the Rules of Procedure should give the Tribunal sufficient discretionary power to ensure that the method of disclosure of oral and documentary evidence meets the needs of the case.
63. We recommend that the Act provide the Tribunal with the power to order a party to compile information that would otherwise be disclosed in an unorganized form, where the compilation would assist the Tribunal in the interests of efficiency and justice.

(j) Procedure for Speedy Judgment Late in the Case

64. We recommend that the Act provide for a speedy judgment process at anytime before a full hearing for cases that can be disposed of on the merits after disclosure is complete. The Tribunal Rules should provide for a simple application procedure for access to this process.

(k) Interim Orders

65. We recommend that the Tribunal be given the power to make interim orders that would prevent injustice in a claim, pending the final hearing of the claim. The Tribunal should also have the power to make interim orders that could be confirmed or changed at the final hearing.

(l) Status Hearings

66. We recommend that the Act or the Rules require the Tribunal to conduct status hearings after a period of time, such as nine months, has passed since the filing of the claim and for which no hearing has been commenced. We recommend that the Tribunal have the power to dismiss a claim or strike out a defence and deem the allegations of discrimination admitted if the delay can be attributed to the claimant or the persons responding to the claim.

(m) Interventions

67. We recommend that the Act empower the Tribunal to allow intervenors to participate in the claim procedure. The Rules of Procedure should provide a procedure for this and also empower the Tribunal to place limitations on the participation of intervenors added by this procedure.

(n) Amendments to Claims or the Addition of Parties

68. We recommend that the Rules of Procedure provide that claims can be amended and new parties added during the hearing process, subject to the rules of natural justice.

(o) The Hearing

69. We recommend that enough Tribunal members be appointed on a full-time basis to carry out the duties under the new system.
70. We recommend that the Rules provide for a direct claim process that is informal and expeditious. We think that case management conferences should be held in each case to clarify and narrow issues, to attempt to reach agreements on facts and to deal with other issues that will assist in making the process as efficient as possible.

71. We recommend that the Tribunal explore methods for tailoring hearings to the needs of parties, offering expedited processes and other innovative processes to vigorously control its caseload.
72. We recommend that the Tribunal be empowered to request that the Commission appear to deal with a point on which the Tribunal wishes to hear representations.

(q) The Orders

73. We recommend the removal of the limits on the amount of compensation that the Tribunal can award for what we would wish to see referred to as injury to "dignity, feelings and self-respect."
74. We recommend that the compensation provisions be expanded so that it is clear that the claimant may receive compensation for any loss suffered as a result of a breach of the Act.
75. We recommend that the Tribunal be empowered to award costs where one of the parties has deliberately delayed the proceedings or where they have engaged in misconduct during the course of the hearing.
76. We recommend that the Act provide that the hearing process be carried out as expeditiously as possible within the limits of natural justice for the parties.

(r) Enforcement of Tribunal Order

77. We recommend that the Commission monitor and enforce orders of the Tribunal.
78. We recommend that the Commission use Tribunal orders as the basis for policy or rule-making so that the ruling in a particular case will affect other similar situations, perhaps preventing more claims about a similar problem.

(s) Appeals of a Tribunal Order

79. We recommend that the Act provide a privative clause that would ensure that the courts would defer to the Tribunal's decisions on procedural and factual matters. We also recommend that a review of questions of jurisdiction and the interpretation of the Act should be decided by the Federal Court of Appeal.

Chapter 11 Assistance in the Claims Process

(b) The Clinic Model

80. We recommend that in cases where the Commission decides not to join the claimant as a party in the claim, that the claimant receive independent and effective legal assistance at public expense.
81. We recommend that the Commission continue to carry out its function of receiving calls for preliminary advice from the public and to assist claimants with identifying whether they have a case, the drafting of a claim form and advising the claimant on the collection of documents and other supporting materials. More complicated cases could be referred to the proposed legal Clinic.
82. We recommend that a Clinic be established to provide claimants whose cases have not been joined by the Commission, with legal assistance in the preparation and presentation of their cases before the Tribunal.
83. We recommend that the Clinic establish itself in Ottawa initially, and then expand to offer regionally based service as it develops.
84. We recommend that the Clinic develop partnerships with community and advocacy organizations with expertise in developing and presenting human rights claims and that there be a mechanism for funding such representation based on criteria developed by the Commission and the Clinic in consultation with interested parties.
85. We recommend that the government provide sufficient resources to ensure that all claimants receive legal assistance at public expense. In the event that the Clinic does not have sufficient resources to represent all claimants at once, they should develop and apply criteria taking into account the means of the claimant, the nature of the claim, its complexity and whether it advances equality. The denial of legal assistance should be the exception.
86. Where a conflict arises between a claimant and the Commission in the conduct of a case that the Commission has joined as a party, the claimant should be able to go to the Tribunal to have it decide whether there is a sufficient conflict to justify separate legal assistance from the Clinic. The Act should provide that the Director of the Clinic should not be subject to outside interference on how the Clinic's legal assistance should be provided.

87. We recommend that respondents who need legal assistance should be able to apply to the Tribunal for legal assistance to be paid from the Commission's budget on a strictly defined tariff where they can clearly demonstrate that they cannot afford it on their own.

Chapter 12 Alternatives to the Claims Process

88. We recommend that Commission staff may attempt informal early settlement if it appears to them that the matter could be easily resolved before a claim is filed.
89. We recommend that the Act provide that mediation be offered within the Tribunal process that we have recommended.
90. We recommend that mediation be carried out as early in the process as possible. However, it should remain available to the parties throughout the process, if it appears to the Tribunal that it might resolve the matter.
91. We recommend that mediation be voluntary, but should be encouraged by advising claimants and respondents of its benefits.
92. We recommend that the Tribunal develop and refine guidelines about the kinds of cases where it should not offer the parties mediation, based on the nature of the claim, the public interest issues at stake, the likelihood of settlement and the interests of justice. However, mediation may be offered if both parties insist.
93. We recommend that mediation be confidential.
94. We recommend that mediators be adequately trained for the task. Mediations should be carried out by Tribunal members. However, the Tribunal member should not be the member who hears the case if mediation is not successful. The Tribunal should have formal measures in place to ensure that information provided to the Tribunal member who conducts the mediation is not made available to the Tribunal member who hears the case. The Act should provide that whoever conducts the mediation is not a compellable or competent witness in the proceedings and that the information disclosed in mediation is confidential and may not be disclosed without the consent of the person who gave the information. In case of high demand, the President of the Panel may hire trained mediators.
95. We recommend that the Tribunal have the power to make consent orders to give effect to settlements that can be enforced through the Federal Court, Trial Division as is the case now.
96. We recommend that in cases where the Commission has joined as a party, the Commission will have to approve the terms of settlement as a party if it is to be bound by the settlement.
97. We recommend that in cases where the Commission has not joined as a party, the Act require parties to provide a copy of the settlement they have reached to the Commission. They should be able to agree on whether the Commission can use the settlement for educational purposes, with or without the names of the parties.
98. We recommend that in cases where the Commission is not a party, the Tribunal be able to ask the Commission whether it wishes to make any representations where the Tribunal member thinks there is an issue of public interest that should be addressed.
99. We recommend that where the Tribunal finds a power imbalance between claimants and the persons alleged to have breached their equality rights, it must take active steps to resolve the imbalance. If a resolution cannot be found then the mediation should be stopped.

Chapter 13 Multiple Proceedings

100. We recommend that the Act provide that the Tribunal defer a claim filed with it until the human rights issue in dispute is resolved in another dispute resolution process where another process is available and able to resolve the human rights dispute and can provide an appropriate and adequate remedy. Otherwise, claims should proceed without delay.
101. We recommend that the Act provide that the Tribunal may dismiss a case that has been the subject of another competent dispute resolution proceeding that has fully dealt with and has provided an adequate remedy on the human rights issues raised by the case. The tribunal should report on the number of claims that it has deferred and dismissed and on research concerning the capacity of other decision-makers to decide human rights cases.

Chapter 14 Who May File a Claim?

102. We recommend that individuals and groups of individuals be able to file claims where they are the victims of an alleged breach of the Act. We also recommend that an individual or group of individuals be able to file a claim alleging a breach of the Act on behalf of an individual victim or victims. However, the consent of the victim should be proved to the Tribunal, unless the victim is incapable of giving consent, for example for reasons of a disability.
103. We recommend that the Act retain the provision enabling the Commission to initiate claims.
104. We recommend that the Act provide that an individual, group of individuals, or an organization be able to bring a claim on behalf of individuals not actually named in the claim form. We recommend that the Rules clarify how representative claims work and that the Rules be as fair and simple as possible.
105. We recommend that there be no requirement for identifiable victims in the Act in order to have a valid claim, as is required by section 40(5)(b) of the current Act.

Chapter 15 The Structure of and Appointments to the Canadian Human Rights Commission, Advisory Council and Tribunal

(a) Structure

106. We recommend that the Act create a Commission with three members appointed on a full-time basis. The Commission would be headed by a President who would act as the Chief Executive Officer of the Commission. The Commissioners would carry out the functions of the Commission with the assistance of a sufficient number of officials. The Commissioners would collectively be responsible for the work of the Commission and would report on each of the Commission's major functions including litigation, employment equity responsibilities, policy and rule-making, inquiries, education and promotion in its Annual Report to Parliament.
107. We recommend that the Act establish an Advisory Council consisting of twelve members drawn from employers and service providers, employee organizations and equality seeking groups who reflect the diversity of the Canadian population, including a gender balance. The Act should require that the Commission consult the Council on such issues as Commission policy and rule-making, objectives for the kinds of cases that the Commission should join as a party before the Tribunal and the kinds of inquiries that the Commission should commence and how it should proceed with matters that require even broader consultation. The Advisory Council members would be expected to keep in contact with the groups with which they have been associated in order to provide the most current advice to the Commission on the viewpoints of the various non-governmental organizations.
108. We recommend that the functioning of the Advisory Council be reviewed in the five year review of the Act.
109. We recommend that the Act require that the Commission maintain regional offices.

(b) Appointments

110. We recommend that the Act should require that Commissioners have "experience, expertise and interest in, and sensitivity to human rights." Additionally, the Act should provide that they have the necessary management, administrative skill and experience to carry out their tasks. Commissioners should be selected based on the following criteria: regional representation; reflect the diversity of the Canadian population; ensure a gender balance.
111. We recommend that the Minister consider a more transparent process for the appointment process including a greater public awareness of the positions available.
112. We recommend that Commission members be appointed to serve on a full-time basis for a term of seven years.
113. We recommend that members of the Advisory Council have "experience, expertise and interest in, and sensitivity to human rights." Advisory Council members should be selected based on the following criteria: regional representation; reflect the diversity of the Canadian population; ensure a gender balance; and should include individuals from different sectors directly affected by the Act.

114. We recommend that members of the Council should be appointed for a term of three years and the renewal of members should be staggered in order to permit continuity on the Advisory Council.
115. We recommend that the requirements for Tribunal members be the same as the Act currently requires with the addition of the following criteria: regional representation; reflect the diversity of the Canadian population; ensure a gender balance. In addition Tribunal members should have knowledge of evidence and procedural matters that would ensure that they are appointed with the necessary skills and experience for conducting hearings and managing the Tribunal's caseload. The size of the Tribunal caseload, the fact that hearings should normally be held by one member and the greater amount of procedural work that members will have to do under the new direct access system requires that all members be members of the Bar or the Chamber of Notaries of Québec.
116. We recommend that the term of a member of the Tribunal should be seven years, with whatever time is necessary to be able to complete the hearings underway at the end of the seven year period and the government should be able to appoint the number of members necessary to handle the caseload created by the direct access model in a timely way.

Chapter 16 The Commission's Reporting Function

117. We recommend that the Commission be required to report on each of its major functions, including litigation, employment equity responsibilities, policy and rule-making, inquiries and education and promotion, in its Annual Report.
118. We recommend that the Advisory Council be provided with its own section of the Annual Report to comment on policy issues and other aspects of the Commission's functions.

Chapter 17 Grounds

(a) Genetic Discrimination

119. We recommend the definition of "disability" in the Act should include the predisposition to being disabled.

(b) Political Belief

120. We recommend that the Commission monitor the need for the ground of political belief and that the issue be reconsidered at the time of the next review of the Act.

(c) Criminal Conviction or Charge

121. We recommend that the ground of "conviction for which a pardon has been granted" be extended to protect persons convicted or charged with a criminal offence.
122. We recommend that the claimant be responsible for showing *prima facie* evidence that the denial of employment or service was in part motivated by a criminal conviction or charge and that the conviction or the charge was irrelevant to the employment or service sought.

(d) Gender Identity

123. We recommend that gender identity be added to the list of prohibited grounds of discrimination in the Act.

(e) Social Condition

124. We recommend that social condition be added to the prohibited grounds for discrimination listed in the Act.
125. We recommend that the ground be defined after the definition developed in Québec by the Commission des droits de la personne and the courts, but limit the protection to disadvantaged groups.
126. We recommend that the Minister recommend to her Cabinet colleagues that the government review all programs to reduce the kind of discrimination we have described here and create programs to deal with the inequalities created by poverty.
127. We recommend that the Act provide for exemptions where it is essential to shield certain complex governmental programs from review under the Act.
128. We recommend that the Act provide that both public and private organizations be able to carry out affirmative action or equity programs to improve the conditions of people disadvantaged by their social condition, and the other grounds in the Act.
129. We recommend that the Commission study the issues identified by social condition, including

interactions between this ground and other prohibited grounds of discrimination and the appropriateness of issuing guidelines to specify the constituent elements of this ground.

(f) Social and Economic Rights and the Act

130. We recommend that the Commission should have the duty to monitor and report to Parliament and the United Nations Human Rights Committee on the federal government's compliance with international human rights treaties, included in its legislation. Provincial and territorial human rights commissions, in consultation with the Commission, may wish to comment on matters within their respective jurisdictions.

Chapter 18 Exceptions to the Act

(a) Mandatory Retirement

131. We recommend that the Minister recommend to her Cabinet colleagues a thorough review of the issue of mandatory retirement in the federal sector based on human rights principles and socio-economic factors, to determine whether mandatory retirement should be subject only to the *bona fide* occupational requirement or whether more specific defences should be crafted to allow for mandatory retirement in defined circumstances.
132. We recommend that there be no blanket defences for mandatory retirement.
133. We recommend that if the Act is amended with respect to mandatory retirement, a transition period be provided to allow employers and employees and their representatives time to adapt.

(b) Pensions and Insurance

134. We recommend that the Act require an employer to defend any discriminatory distinction in insurance or pension plans using a defence that incorporates the elements of a principled defence to rights claims. The test would take into account the importance of the objective of the discriminatory act, the causal connection between the discriminatory act and its objective, the existence of practical but less discriminatory options to the discriminatory act, and the importance of the objective of the discriminatory act compared to the magnitude of the discrimination.
135. We recommend that the Act provide that an individual should not be refused employment because of an inability to become a member of a pension or insurance plan.
136. We recommend that the Commission provide guidance to employers, service providers, insurers and the public on equality issues in insurance and pension plans in the form of policy statements or Codes of Practice after consultation with all interested parties. This would provide a firm foundation for making decisions about appropriate insurance and pension plans.
137. We recommend elimination of the provision preventing claims about government pension plans established by statute before March 1, 1978.
138. We recommend that the Act not automatically provide that the changes in the approach to pension and insurance benefits take place only after such amendments have been made. Instead, the Minister should recommend to the government that any discrimination in pension or insurance plans that would be immunized because of a rule providing for the prospective operation of our recommendations should be justified.
139. We recommend that the practice when changes are made to pension rules to provide that the rules apply only to contributions and benefits made or accrued after the rule change not apply automatically when the changes we recommend are implemented.
140. We recommend that the government examine any continuation of a discriminatory benefit to satisfy itself that there is no practical alternative to eliminating the discrimination, even if this were to place a cost burden on employers, including itself.

(c) The *Indian Act* Exception

141. We recommend that section 67 be removed from the Act so that the Act applies to the federal government and Aboriginal governments. We recommend that the Minister of Justice ensure that the Act applies to self-governing Aboriginal communities until such time as an Aboriginal human rights code applies, as agreed by the Federal and First Nations governments.
142. We recommend that an interpretative provision be incorporated in the Act to ensure that Aboriginal community needs and aspirations are taken into account in interpreting the rights and defences in the Act in cases involving employment and services provided by Aboriginal governmental

organizations. Such a provision would ensure an appropriate balance between individual rights and Aboriginal community interests. It should operate to aid in interpreting the existing justifications in the Act and not as a new justification that would undermine the achievement of equality.

(d) Hate Messages

143. We recommend that, to the extent that it is possible, the prohibition of hate messages in the Act be broadened to encompass both existing and future telecommunications technologies in federal jurisdiction.
144. We recommend that the Tribunal be given the power to order an Internet access/service provider to refuse or cease to provide access to the Internet to a person found to have engaged in this discriminatory practice. This would be subject to the Tribunal being able to tailor such an order to respect private communications and to the technological ability of access/service providers to comply with such an order.
145. We recommend that the access/service provider should be found liable itself to the extent that it knew or should have known that its facilities were being used to disseminate hate messages, based on the extent of its knowledge and technological ability to take measures to prevent future breaches of the Act.
146. We recommend that the Commission develop policies and Codes of Practice with interested persons to provide guidance on the requirements of the Act and the scope of private communications that should not be subject to the prohibition against hate messages.

Chapter 19 Other Issues

(a) Who is a Person Affected by a Breach of the Act?

147. We recommend that the Act cover all individuals present in Canada, including those who are not lawfully present.
148. We recommend that the Act not define the concept of who is a victim to allow it to grow with the understanding of the concept of equality.
149. We recommend that an individual not be able to obtain a stay of removal proceedings because a claim has been filed under the Act, nor should the Tribunal be able to grant immigration status. Further, claims filed about immigration matters should be dealt with according to our chapter on Multiple Proceedings.
150. We recommend that the Minister of Citizenship and Immigration continue to determine an individual's immigration status for the purposes of the *Canadian Human Rights Act*.
151. We recommend that the current restrictions on the right of individuals who are not Canadian citizens or permanent residents to file claims about events occurring outside Canada should remain.
152. We recommend that the Act continue to be broad enough to allow for the Tribunal's interpretation that allows an individual to file a complaint alleging discrimination in the refusal of a sponsorship application or with respect to a denial of a visitor's visa, even though the individual being sponsored or the visitor is not a citizen and the denial took place outside Canada.
153. We recommend that the Commission should have the power to initiate claims concerning what it views as discrimination in the immigration process, including claims about discriminatory practices carried on outside Canada by immigration or other officials of the government of Canada based on information received from the public during the initial inquiries made to Commission officials and research carried out by the Commission. The Commission should also be able to initiate claims about the activities of federally regulated employers and service providers carrying on business outside Canada.
154. We recommend that the Act should provide that the duty to ensure equality without discrimination on any ground in the Act includes the perception that an individual or group of individuals has the personal characteristic relating to that ground. Where the discrimination is justified, but the individual did not have the characteristic at issue, then the finding of discrimination should stand.
155. We recommend that the Act prohibit discrimination against one person because of their association with another who is protected by the Act.

(b) Clarification of the Definition of Employment Under the Act

156. We recommend that the Act be amended to include a definition of employment that applies to employees of Parliamentary institutions, including the House

of Commons, the Senate, the Library of Parliament, Ministers and Members of the House of Commons and Senate.

(c) Successor Employers and Service Providers

157. We recommend that the Act provide that where an employer or service provider sells, transfers, leases or otherwise disposes of control over its business, then the person who obtains control over the business becomes a party to a claim filed against the employer or service provider at the time of the transfer or within a specified time thereafter and may be liable along with the original employer or service provider to a Tribunal order. We recommend that the specified time be long enough to ensure that employees and consumers of the service know that the sale has taken place. This should be between three and six months.
158. We recommend that the Act make clear that the original employer or service provider also remains liable.
159. We recommend that a successor employer or service provider should not be liable for "special compensation" for engaging in the discriminatory practice willfully or recklessly under the Act, as long as it can show that it acted in good faith in the circumstances surrounding the sale and afterwards.
160. We recommend that the Act provide that where an order is made by the Tribunal to take steps over time to bring a workplace into compliance with the Act and the employer or service provider later sells the workplace to another person, and where there is continuity of the work and activities by the employees and the purpose of the business remains the same, the order of the Tribunal should continue to apply even though it was not made against the new employer or service provider.

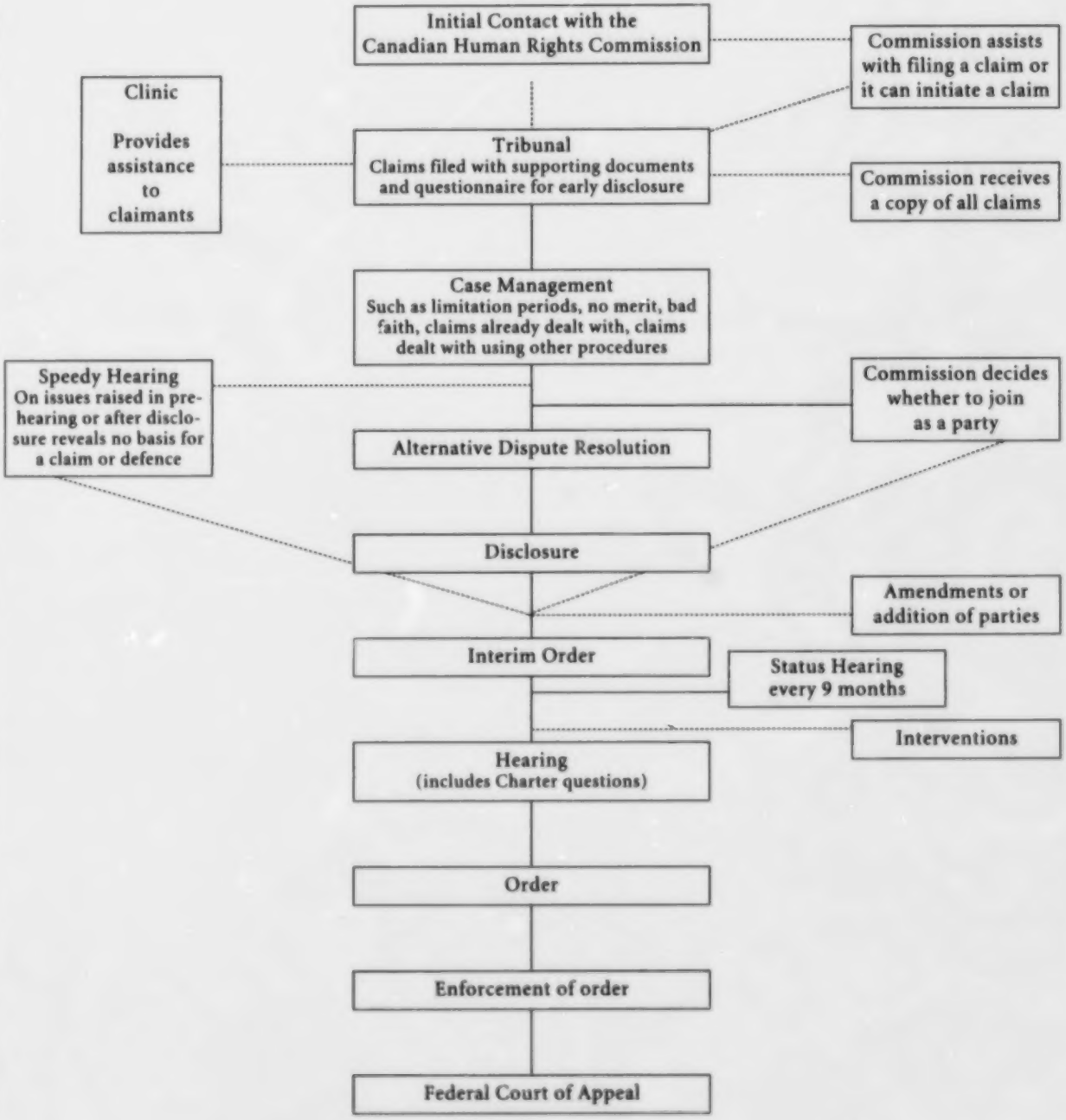
(e) Retaliation

161. We recommend that the criminal offence of retaliation remain in the Act to demonstrate the conviction of society that this kind of interference in the claims process cannot be tolerated.
162. We recommend that the civil prohibition of retaliation be as broad as the criminal prohibition.
163. We recommend that individuals who participate in the inquiries conducted by the Commission and who participate in the internal responsibility system, both discussed in Part II of our Report or who otherwise engage in activities promoting compliance with the Act, should also be protected from retaliation.

Chapter 20 General Points

164. We recommend that the government should provide the resources that the Commission and the Tribunal need to make the most of the recommendations that we have made.
165. We recommend that the Act be reviewed in five years after the changes that we have recommended have been implemented to ensure that it is working effectively.

ANNEX D
Direct Access Claim Model


Initial Contact with the Canadian Human Rights Commission
Commission assists with filing a claim or it can initiate a claim
Clinic
Provides assistance to claimants
Tribunal
Claims filed with supporting documents and questionnaire for early disclosure
Commission receives a copy of all claims
Case Management
Such as limitation periods, no merit, bad faith, claims already dealt with, claims dealt with using other procedures
Speedy Hearing
On issues raised in pre-hearing or after disclosure reveals no basis for a claim or defence
Commission decides whether to join as a party
Alternative Dispute Resolution
Disclosure
Amendments or addition of parties
Interim Order
Status Hearing every 9 months
Interventions
Hearing
(includes Charter questions)
Order
Enforcement of order
Federal Court of Appeal

ANNEX E
Organizations Consulted in the Review Process

Aboriginal Human Rights Commission (Alberta)
Action travail des femmes
Affiliation of Multicultural Societies and Service Agencies of British Columbia (AMSSA)
African Canadian Legal Clinic
Agriculture and Agri-Food Canada
Air Canada
Air Nova
Aircraft Operations Group Association
Algoma Central Marine
Armed Forces Pensioners' and Annuitant's Association of Canada
Aseniwuche Winewak Nation
Association des Femmes Autochtones d'Odanak
Association des physiciens
Association for the Right to Work
Association multiethnique des médecins diplômés hors Canada
Association of Indo-Canadians
Association québecoise des étudiants ayant des incapacités au post-secondaire
Bank of Montreal
Barreau du Québec
Betty Dion Enterprises Ltd
B'nai Brith Canada
British Columbia Human Rights Coalition Vancouver Region
British Columbia Public Interest Advocacy Centre
British Columbia Maritime Employers Association
British Columbia Men's Resource Centre
Canada Post Corporation
Canada's Association for the Fifty-Plus
Canada-Asia Working Group
Canadian Airlines International Ltd.
Canadian Association for Community Living
Canadian Association of Broadcasters
Canadian Association of Independent Living Centres
Canadian Association of the Deaf
Canadian Association of the Non-Employed (C.A.N.E.)
Canadian Auto Workers-Canada
Canadian Bankers Association
Canadian Bar Association
Canadian Consortium for International Social Development
Canadian Council for Refugees
Canadian Council of Human Resources Association
Canadian Council of the Blind
Canadian Council of United Food and Commercial Workers
Canadian Ethnocultural Council
Canadian Free Speech League
Canadian Hard of Hearing Association (CHHA)
Canadian Hearing Society
Canadian Heritage
Canadian International Development Agency
Canadian Jewish Congress
Canadian Labour Congress
Canadian Multicultural Education Foundation
Canadian National (CN)
Canadian National Institute for the Blind (CNIB)
Canadian Pacific Railway
Canadian Regional Airlines Limited
Canadian Security Intelligence Service
Canadian Teachers' Federation
Canadian Trucking Alliance
Canadian Union of Public Employees
Cape Breton Development Corporation
Catholic Health Association of Canada
Catholic Women's League of Canada
Center for Research-Action on Race Relations (CRARR)
Centre for Equality Rights in Accommodation (CERA)
Charter Committee on Poverty Issues
Citizenship and Immigration Canada
Coalition for the Reform of the Ontario Human Rights Commission
Coalition of Persons with Disabilities — Newfoundland and Labrador
Coalition of Visible Minority Women
Coalition pour la défense des droits des hommes du Québec
Commissioner of Official Languages, Office of the
Communications, Energy and Paperworkers Union of Canada
Conseil consultatif sur la condition de la femme du Nouveau-Brunswick
Council of Canadians with Disabilities
Dalhousie Legal Aid Service
Enbridge Pipelines Inc.
End Legislated Poverty
Equal Parents of Canada

Equality for Gays and Lesbians Everywhere (EGALE)
Ethics Institute of Canada
Evangelical Fellowship of Canada (EFC)
Father Craft Canada
Fathers for Equality
Federally Regulated Employers — Transportation and Communication (FETCO)
Fédération des communautés francophones et acadienne du Canada
Fédération des Francophones de la Colombie Britanique (FFCB)
Friendship Court
Global Communications Limited
Groupe d'aide et d'information sur le harcèlement sexuel au travail de la province du Québec Inc.
Halifax Employer's Association (HEA)
Health Canada
Helping Ourselves Out of Poverty (HOOP)
Human Resources Development Canada (Labour Program)
Human Resources Professionals Association of Ontario (HRPAO)
Human Rights Education Foundation
Human Rights Research and Education Centre
I.M.P. Group Limited
Indian and Northern Affairs Canada
Indian Rights for Indian Women
Inter-Church Committee for Refugees
International Centre for Human Rights and Democratic Development
Japanese Canadian Citizens Association
Ligue des droits et libertés
Loon River First Nations
Low Income Families Together (LIFT)
Manitoba Association for Rights and Liberties
Mayor's Committee Against Racism and Discrimination (City of Hamilton)
Mayor's Committee on Community and Race Relations (City of St. Catharines)
McLarren Consulting Group Inc.
Men's Health Network of Canada
Metropolitan Action Committee on Violence Against Women and Children (Metrac)
Metro Toronto Chinese & Southeast Asian Legal Clinic
Minority Advocacy & Rights Council (MARC)
Mohawk Council of Kahnawake
Multicultural Association of Fredericton Inc.
Multiple Sclerosis Society of Canada
National Action Committee on the Status of Women (NAC)
National Anti-Poverty Organization (NAPO)
National Association of Women and the Law (NAWL)
National Capital Alliance on Race Relations (NCARR)
National Defence
National Indo-Canadian Council
National Parole Board
Native Council of Canada (Alberta)
Native Council of Prince Edward Island
Native Women's Association of Canada (NWAC)
NAV Canada
New Brunswick Aboriginal Peoples Council
New Brunswick Advisory Council on the Status of Women
New Brunswick Labour Force
New Brunswick Visible Minority Steering Committee
Newfoundland and Labrador Employers' Council
Newfoundland and Labrador Independent Living Resource Centre
Northern Women's Human Rights Committee
Nova Scotia Advisory Council
Nova Scotia League for Equal Opportunities
Nova Scotia Legal Aid
Nova Scotia Union of Public Employees
Nunavut Council for People with Disabilities
OC Transpo
Ontarians with a Disability Act Concept
Ontario Power Generation
P.E.I. Council of the Disabled
Pacific Institution for Advanced Studies
Parent Finders of Hamilton-Burlington
Parkdale Community Legal Services
People Empowering Themselves Against the System (PETAS)
Premier's Council on the Status of Disabled Persons (New Brunswick)
Première Nation Malécite de Viger
Professional Institute of the Public Service of Canada
Public Service Alliance of Canada
Public Service Commission
R.E.A.L. Women of Canada
Regina Anti-Poverty Ministry
Respect de la vie mouvement d'éducation
Rogers Communication Inc.
Saskatchewan Action Committee, Status of Women
Saskatchewan Deaf and Hard of Hearing Services Inc.
Service Employees International Union
Single and Divorced Speak Out Association

Sip'kop Mi'kmaw and the Federation of Newfoundland Indians
Society for Racial Justice in British Columbia
Solicitor General Canada
Status of Women Canada
Status of Women Council of the Northwest Territories
Street Health
Table féministe francophone de concertation provinciale de l'Ontario
T-Base Communications
Transport Canada
Treasury Board of Canada
United Steelworkers of America
Urban Alliance on Race Relations
Vancouver Family Court/Youth Justice Committee
Vancouver Rape Relief & Women Shelter
Victoria Men's Centre
Voice of Canadians Committee
Women Against Violence Against Women Rape Crisis Centre
Women's Legal Education and Action Fund (LEAF)
Working Group on Poverty
Workplace Equity Services
Yarmouth County Affirmative Action Committee

Consultants

Anand, Raj
Barker, Carey
Barnes, Peter
Bevan, Lynn
Bickerton, Geoff
Brazier, Don
Byrne, Leslie
Carrington, David
Cohen, Michael
Cunningham, Pat
Day, Shelagh
Dhaliwal, Raj
Englemann, Peter
Findlay, Andrew
Francis, Phillip
Gottheil, Lewis
Greshner, Donna
Hallam, Mike
Ivey, Celeste
Jorsen, Robert
Lambert, Collin
Magon, Harminder
Olsen, David
Onyalo, David
Paquette, Carmen
Pentney, Bill
Pratt, Bill
Sullivan, Reginald
Symons, Ellen
Urchak, Karen
Yussuff, Hassan

Commissions and Tribunals Consulted

Alberta Human Rights and Citizenship Commission
British Columbia Human Rights Commission
Canadian Human Rights Commission
Canadian Human Rights Tribunal
Commission des droits de la personne et des droits de la jeunesse (du Québec)
Manitoba Human Rights Commission
New Brunswick Human Rights Commission
Newfoundland Human Rights Commission
Nova Scotia Human Rights Commission
Office of the Fair Practices Act Northwest Territories
Ontario Human Rights Commission
P.E.I. Human Rights Commission
Québec Human Rights Tribunal
Saskatchewan Human Rights Commission
Yukon Human Rights Commission

We have also benefited greatly from all the papers that have been sent to us and we would like to thank the authors.

ANNEX F
Individuals Consulted in the Review Process

Abbasi, Maryam
Ackerly, Jackie
Addy, Dale
Ali, El
Alloway, Carole Ann
Ally, Ron
Anand, Raj
Anderson, J. Fergus
Anderson, Val
Antonsen, Heather
Argue, Marsha
Arledge, Sandra
Armstrong, Bromley
Athwal, Gina
Atkens, David
Aylward, Carol
Ayotte, Sharlyn
Bailey, Ross
Baker, David
Bankier, Jennifer
Basque, Ben
Beachell, Laurie
Beattie, Pat
Beaudin, Peter
Beauregard, Josée
Bélanger, Jean Daniel
Bell, Don
Bender, Susan
Bergin, Louise
Blackell, Gillian
Blackstaffe, Trish
Blaszczyk, Yvonne
Boileau, François
Boire-Carrière, Francis
Boogemans, Scott
Bordeleau, Denis
Borlé, Louise
Bouhadou, Gilali
Bouthier, Ross
Brady, Deborah
Braker, Catherine
Brazier, Don
Brent, Delores
Brodsky, Gwen
Brosseau, Carole
Brown, Bev
Brown, Vicki
Bruce, Susan
Bruneau, Martine
Buffalo, Marilyn
Calderhead, Vincent
Campbell, Fiona
Campbell, Susan
Cantlie, Colin
Carlson,Nellie M.
Carnegie-Douglas, S
Cavanagh, Richard
Ceminchuk, Barry
Chamberlain, Randy
Charbonneau, Yannick
Charron, Diane
Cherry, Robert
Chic, Jacquie
Chiefmoon, Keith
Chisholm, Valerie
Cholette, Elsie
Chopra, Shiv
Choquette, Sandra
Chrisholm, Valerie
Clayton, Angela
Clément, Pierre
Coleman, Perry
Colosimone, Richard
Comeau, Madeline
Corbeil, Serge
Cornell, Susan
Cornish, Mary
Côté, Andrée
Côté, Normand
Couture, Annie
Coweny, Lori
Cox, Rachel
Crawford, Bill
Cross, Pamela
Cullinan, Anna
Dahl, Marilyn
Davies, Libby
Day, Shelagh
D'eault, Alice
Depeza, Joan
Desesare, Michel
Dhaliwal, Raj
Di Francesco, Olga
Dick, Emmanuel
Dickinson, Donna
Dickson, Sandra
Diederich, Grace
Diehl, Sally
Dion, Betty
Dumais, Jocelyn
East, Robin
Eaton, Colin
Eaton, Emily
Edy, Brian
Elder, John
Emburg, Lois
Fairweather, Gordon
Faria, Cidalia
Finestone, Senator Sheila
Finlay, Andrew
Fisher, John
Ford, Clarence
Foster, Joe
Foster, John W.
Foulder, Judy
Francis, Phillip
Frank, Lily
Frazer, Catherine
Frederiksen, Penney
Friedman, Rubin
Friesen, Tami
Gates, Bruce
Gauthier, Francine
Geh, Sarah
Gelean, Dennis
Gillis, Margaret
Gilmore, Alan
Gilmour, Robert
Glatt, Rick
Gliberzon, Bill
Glover, Peter
Glover, Sandra
Glover, Stella
Go, Avy
Gottheil, Lewis
Goretsky, Allen
Grace, Elizabeth
Graham, Lawrence R.

Grant-Cummings, Joan
Grey, Josephine
Grinberg, Gary
Grow, Sylvie
Haag, Carl
Haberl, Louise
Hargadon, Brian
Harris, Keith
Hartle, Karla
Harvey, Beverly
Hatfield, Ray
Hawley, Mike
Haywood, Yvonne
Hegleman, Rendle
Helenka, Lorna
Hidlevaugh, Paul
Hooey, David
Hopkins, Colleen
Houlden, J.G.
Houle, Camille
Hune, Sandra
Hunte, Ruby
Hureau, Andy
Hyska, Brenda
Inaba, Donna
Innes, Robert
Iris, Rachel
Irlinger-Renaud,C.
Ivy, Celeste
Jackman, Martha
Jains, Susan
Jankun, Joanne
Jewers, Judy
Jussila, Peter
Kassian, Lorn
Kathwaroon, Ray
Kennedy, Bev
Kerzner, Lana
Khaki, Aziz
Khan, Zak
Kilabuk, Meeka
King, Holly
Kitagawa, Tosh
Koephe, L.
Kohl, Paul
Koilpilla, Robinson
Koroma, Sheak
Kuehn, Sadie
Kwiatkowski, Nola
Lachapelle, Johanne
Laforestenie, Francis
Laframboise, Sandra
Lafrance, Albert
Lakeman, Lee
Landolt, Gwendoline
Lavallée, Betty Ann
LaValley, Ethel
Lavigne, Robert
Law, Joanne
Lawrence, Patricia
Lazarus, Rivka
LeBlanc, Philippe
Lee, Alice
Lemieux Brossard, Lucie
Lépine, Pierre
Lepofsky, David
Lie-Nielsen, Anne
Lipsett, Edward
Long, Richard
Lord, Stella
Lorne, Kassian
Lowry, Anthony
Lowry, Heather
Lucas, David
Lucasz, Granosik
Lund, A.C.
Lundman, Brenda
Lys, Lorraine
MacDonald, Arlene
MacDougall, Roger
Mackay, Wayne
Mackintosh, C.
MacLavy, Tom
MacLeod, Leslie
Macquarrie, Catherine
Mailloux, Paulette
Mair, Stuart
Malkowski, Gary
Manchee, Janice
Mapp, Randy
Markwick, Sarah
Marleau, Lucille
Marsh, Janet
Marshall, Murray
Martineau, Luc
Matas, David
Mathieu, M.F.
McCabe, Charles
McCarthy, Karen
McCauley, Pat
McGowan, Janet
McKay, Don
McNamara, Janice
McNeil, Claire
McRae, Susan
McTaggart, Rick
McTiernan, Miriam
Mendes, E.P.
Mercier, Louise
Meunier, Connie
Mignerone, Genevieve
Mittleman, Barbara
Mock, Karen
Montagano, Silvy
Montreuil, Micheline
Moreau, Linda
Morton, Bonnie
Nair, Jay
Naurang, Singh
Nelson, Paul
Nesbeth, Deborah
Nest, Erwin
Nielsen, Gladys
Niemi, Fo
Nikias, Vangelis
Nowoselski, Dallis
Oakley, Amani
O'Bomsawin, Evelyne
O'Brien, Hyman
O'Donnell, Susan
Olsen, David
Onyalo, David
O'Pray, Gerry
Osborne-Thomas, Marlene
Ouellet, Jean-Guy
Parsons, Margaret
Paskaruk, Ken
Patenaude, Paul
Pathmoyohen, L.
Patrick, Beatrix
Pattison, Alan
Paul, Gale
Pavao, Maria
Pellerin, Sheilah
Perere, Ranjit
Perrier, Andrée
Perry, Joan

Philion, Rachel
Piché, Jean
Pierce, Don
Poirier, Jeff
Porter, Bruce
Price, Valerie
Prutschi, Manuel
Radyo, Vera
Rathwell, Cynthia
Raymond, Rae
Reid, Brian
Rektor, Laurie
Rendle, Gwen
Renoylds, Lenard
Richard, Noëlla
Richards, Dianne
Riedle, Lucille
Ringuet, Jean-Noel
Robert, François
Robert, John A.
Robinson, Laura
Rogers, Kate
Rough, Sarah
Rueck, Gil
Sackrule, Bart
Sampson, Fiona
Sanderson, Elizabeth
Sangster, Wendy
Sayeed, Raffath
Scharf, Shirley Ann
Scheire, Bruno
Scher, Hugh
Sciortino, Joséphine
Séguin, Yvonne
Seignoret, Ed
Seiler, Scott
Sekhar, Kripa
Shaw, Melville H.
Sherwood, Michelle
Silberman, Toni
Simon, Ginette
Simon, Roger
Sinclair, Colin W.
Singh, Indra
Singh, Kamilla
Singh, Naurang
Sinuk, Vita
Sirois, Ghislaine
Slattery, Edwina
Slusarchuk, Jessica
Small, Michael
Smith, Ann
Sofea, Donald
Solomon, Damian
Somers, Ken
Spragge, Wayne
Stark, Chris
Stark, Marie
Steinhaver-Anderson, K.
Stewart, Angela
Stewart, Bob
Stockton, Ron
Stokes-Bonhomme, K.
Stonehouse, Martine
Stroe, George
Stuart, Marlene
Sutton, Zoë
Szuch, Angie
Tal, Avi
Tallio, Wilfred
Tarkington, Erik
Théberge, Carole
Théroux, Lise
Thomas, George
Thomas, Viola
Thompson, Lynda
Thompson-Ellis, Pam
Thomson, Mabel
Tie, Chantal
Tinari, Paul
Tong, Lily
Tremblay, Maryse
Trotzki, Barbara
Tse, Elton
Tucker, Marilyn
Tunis, Deborah
Udvarhelyi, Edmond
Urge, Jean-Etienne
Urichuck, John
Ursel, Susan
Valiquette, Gilles
Van Wagner, Charles
Venne Stanley, Muriel
Verma, Madhu
Verma, Ram
Villasin, Fely
Vlug, Henry
Wagle, Helen
Wagner, Charles Van
Walters, Traci
Warner, Mary
Watson, Gordon
Welykyi, John
West, John
Westland, Joan
Wheaton, Donna
White, Lynda
White, Patrick
Whitter, Mervin
Wile, Nina
Williams, Michelle
Wong, Gerry Arthur
Yalden, Maxwell
Youla, Adama Raby
Young, Margot
Yung, Robin
Yussuff, Hassan
Zenger, Leslie

ANNEX G
Summary of Commissioned Research

Agarwal, Naresh C., Ph. D.,
Mandatory Retirement and the Canadian Human Rights Act (CHRA)
This study examines the key issues involved in the debate on whether or not mandatory retirement policies should be eliminated and replaced by flexible retirement policies. Data are presented on mandatory retirement policies among organizations in the federal sector and the perceived impact of eliminating these policies. The author conducts an analysis of the current legal situation concerning mandatory retirement in Canada and suggests policy options for amending the CHRA's provisions.

Anand, Raj and Mohan Sharma
Report on Direct Access to Binding Adjudication under the Canadian Human Rights Act
This report proposes a model of direct access to binding adjudication for all complaints under the *Canadian Human Rights Act*. The proposed model seeks to address concerns with the complaints process including, provisions found in the *CHRA* which allow the Commission to extinguish a complainant's right to a hearing without a determination on the merits and the long delay that too often accompanies the resolution of human rights complaints.

Berry, Helen and Mimi M. Lepage
Social Condition — Literature Search
This paper surveys Canadian and international literature, research and case law concerning social and economic rights with a view to how these rights might potentially be incorporated into Canada's human rights mechanisms.

Birenbaum, Joanna and Bruce Porter
Screening Rights: The Denial of the Right to Adjudication under the Canadian Human Rights Act and How to Remedy It
This paper reviews the screening function of the Canadian Human Rights Commission — the discretionary power accorded the Commission to decide whether a complaint will be referred to the Canadian Human Rights Tribunal for adjudication.

Buckley, Melina
Human Rights Dispute Resolution Options for the 21st Century : A Policy Framework
The purpose of this paper is to provide a policy framework to assist in shaping the discussion on whether and how dispute resolution options should be integrated into the Commission and Tribunal complaints processes. This paper provides new ways to think about the complaints process within the reality of the Commission's fiscal, institutional and legal constraints.

Chartrand, Larry N.
The Indian Act Exemption — Options for Reforming the Canadian Human Rights Act
This paper is designed to promote discussion and dialogue on whether section 67 is meeting the needs of Aboriginal peoples and other Canadians. In particular should the exemption provision be repealed, modified, strengthened or remain unchanged? Various options for reform are presented for discussion and feedback.

Corbett, Stan, PhD, LLB
Human Rights Adjudication, Human Rights Education: Two Models of Institutional Independence
The author addresses the question of independence of the Canadian Human Rights Tribunal from the Canadian Human Rights Commission with respect to the Commission's dual role as complaints screener and investigator. One option presented is a broader role for the CHRC in international human rights protection thereby enhancing the functions of the Commission which are not directly linked to the adjudicative function of the Tribunal.

Corbett, Stan, PhD, LLB
Making Human Rights Visible: The Language of Human Rights
The author discusses the need for international unanimity in understanding what human rights actually means and what standards must be implemented in order to ensure human rights are effective.

Cox, Rachel, for Action travail des femmes
The Human Rights Tribunal Order in Action travail des femmes v. Canadian National: A Path Littered with Obstacles
This paper sets out the chronology of events relating to *Action Travail des Femmes v. Canadian National Railway* (CN). In 1984, this case led to the imposition for the first time in Canada of an affirmative action program by the Canadian Human Rights Tribunal, whose decision was upheld by the Supreme Court in 1987. The study describes the fate of the order from the time it took effect in 1988 to the present. It notes the provisions of the *Canadian Human Rights Act* as a result of which the same order could not be made today. Because of the problems encountered in enforcing the order made against CN, the document describes different models for monitoring, reviewing and punishing failures to comply with the affirmative action program imposed by a Tribunal.

Day, Shelagh and Gwen Brodsky
Screening and Carriage: Reconsidering the Commission's Functions
This paper outlines the key concerns with the CHRC's current complaint screening and carriage processes including: long delay; the high rejection rate of complaints; the Commission's authority to summarily extinguish rights; lack of participation of the complainant; and the underdeveloped role of the Commission in addressing systemic discrimination. The authors assess these concerns and present several models to address them.

Dickson, Mary Louise, Q.C.
Treatment of Pensions and Insurance in the Canadian Human Rights Act and Regulations
Currently, the *Canadian Human Rights Act* and the *Canadian Human Rights Benefit Regulations* permit certain distinctions in pension and insurance plans on prohibited grounds of discrimination. The author highlights these distinctions and offers several options on how the Act and Regulations may be clearer with regard to the pension and insurance exceptions.

Eberts, Mary, for Native Women's Association of Canada (NWAC)
Aboriginal Women's Rights are Human Rights
This study describes Native women's struggle to overcome numerous discriminatory obstacles, including provisions of the *Indian Act*, the ramifications of Bill C-31, and numerous concerns regarding section 67 of the Canadian Human Rights Act. This report concludes with 17 recommendations, the first of which is to repeal section 67.

Fairbairn, Lyle, Q.C. and Margot Priest
Enhancing Compliance with Human Rights Objectives — Policy Options
This paper identifies compliance problems commonly associated with the "complaints-based" model of human rights legislation in a number of jurisdictions (Canada, the United Kingdom, Australia and the United States) and examines regulatory options for enhancing compliance with the underlying objectives of such legislation.

Fairbairn, Lyle, Q.C. and Margot Priest
Enhancing Internal Responsibility for Human Rights Protection, The Workplace Committee Model and Use of Inquiry Powers to Address Discrimination
This paper looks at various methods of addressing discrimination in the workplace. One model that is closely examined is the role of workplace human rights committees as a mechanism for enhancing internal responsibility for the protection of human rights in the workplace.

Greschner, Donna
The Complaint Process in Other Countries: Any Lessons for Canada?
This paper focuses on complaint processing for anti-discrimination law in the United States, Northern Ireland and Great Britain. It examines whether these systems have useful innovations or procedures that could be incorporated in Canadian human rights enforcement.

Greschner, Donna
Two Preventative Measures
Preventative mechanisms are those employed by the Canadian Human Rights Commission in its efforts to stop or discourage discrimination before it occurs, as opposed to assisting complainants in obtaining a remedy after a discriminatory event has occurred.

This report considers two types of preventative mechanisms: exemptions and rule-making powers. It examines the varied use of these powers in provincial jurisdictions, and outlines considerations for designing effective mechanisms at the federal level.

Lamarche, Lucie
Social condition as a prohibited ground of discrimination in human rights legislation: Review of the Québec Charter of Human Rights and Freedoms
The purpose of this document is to examine the appropriateness of including social condition as a prohibited ground of discrimination in the exercise of the rights protected by the *Canadian Human Rights Act* and the reasons for doing so.

Lepage, Mimi M.
Successor Employer or Service Provider Obligations in the Canadian Human Rights Context
This paper examines what happens to a human rights complaint when a respondent employer or service provider sells the business or part of the business, undergoes corporate restructuring or legally ceases to exist under the current provisions of the *Canadian Human Rights Act.*

MacKay, A. Wayne, Tina Piper and Natasha Kim
Social Condition as a Prohibited Ground of Discrimination under the Canadian Human Rights Act
This report considers the proposal of including "social condition" as a prohibited ground of discrimination under the *Canadian Human Rights Act.* Some of the questions addressed include: why and if it should be included; what the effects of the inclusion would be; how such an inclusion would be effected.

O'Donnell, Tracey
Preserving Our Place
This paper addresses various issues arising from section 67 of the CHRA, which excepts the *Indian Act* from the scope of the CHRA. The first part of this paper reviews the research methodology utilized to secure the information upon which this research and options paper is based. Part 2 summarizes the input from the First Nations community. An overview of the state of human rights legislation in Canada, the United States of America, Australia and Scandinavia as it affects the aboriginal peoples in those countries comprises Part 3 of this paper. Finally, Part 4 sets out a description of a number of options together with arguments both for and against these options.

Robinson, Patrice A.
Identifying Options in the Human Rights Context for Dealing with Hate Propaganda on the Internet
This paper describes the way the Internet works, and the difficulties this new technology poses for regulators concerned with eliminating or reducing the availability of hate propaganda on the Internet. Existing legislative provisions are discussed for their applicability and effectiveness in dealing with hate propaganda on the Net. The paper surveys ideas and options put forth by interested parties, and identifies options in the Canadian human rights law context for addressing these issues.

Robinson, Patrice A.
National Capital Alliance on Race Relations vs. Canada (Health and Welfare): A Case Study
This is a case study that explores the development and legacy of a very significant systemic discrimination case, *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, (1997) C.H.R.D. No. 3. The paper reveals the 'anatomy' of the case, tracing it as it progressed from the initial intake and investigation stages to its current monitoring stage, in an attempt to identify lessons learned.

Shillington, Richard
Adding Social Condition to the Canadian Human Rights Act: Some Issues
This report poses the question of what impact the inclusion of social condition may have if included as a ground of prohibited discrimination in the CHRA. Based on studies that demonstrate that income inequality affects the lives of low-income Canadians in dramatic ways including their health, psycho-social development, education and subsequent income, the author assesses whether children raised in poverty are predisposed to live with reduced health, education and income.

Steinberg, Samuel
Assessing the Need to Protect Political Beliefs under the CHRA
This summary considers whether discrimination based on political beliefs should be included as a prohibited ground of discrimination under the *Canadian Human Rights Act*. The first section briefly reviews the constitutional considerations of adding or excluding this ground. Second, the relevance of international law and Canada's obligations are canvassed to determine if there are any implications resulting from the absence of this prohibition. The third part of this analysis reviews provincial jurisdictions' prohibitions and their experiences at enforcing them. Based on all of the above, the concluding section of this summary provides a number of options relating to this ground.

See also: **"Women and the Canadian Human Rights Act: A Collection of Policy Research Reports"** — from the "Status of Women Canada" web site (www.swc.cfc.gc.ca).